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OPINION OF THE ATTORNEY-GENERAL OF THE UNITED STATES, ON THE SUSPENSION OF THE WRIT OF HABEAS CORPUS.

ATTORNEY-GENERAL'S OFFICE, *July* 5, 1861.

SIR: You have required my opinion in writing upon the following questions:—

1. In the present time of a great and dangerous insurrection, has the president the discretionary power to cause to be arrested and held in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity?

2. In such cases of arrest, is the president justified in refusing to obey a writ of *habeas corpus* issued by a court or a judge, requiring him or his agent to produce the body of the prisoner, and show the cause of his caption and detention, to be adjudged and disposed of by such court or judge?

To make my answer to these questions at once consistent and plain, I find it convenient to advert to the great principle of government as recognised and acted upon in most, if not all, the countries in Europe, and to mark the difference between that principle, and the great principle which lies at the bottom of our national government.

Most European writers upon government assume, expressly or by implication, that every national government

is, and must be, the full expression and representation of the nation which it governs, armed with all its powers and able to assert all its rights. In England, the form of whose government more nearly approximates our own, and where the rights, interests, and powers of the people are more respected and cared for than in most of the nations of the European continent, it has grown into an axiom, that "the Parliament is omnipotent," that is, that it can do anything that is possible to be done by legislation or by judgment. For all the ends of government, the parliament is the nation. Moreover, in Europe generally, the sovereignty is vested visibly in some designated man or set of men, so that the subject people can see their sovereign as well as feel the workings of his power. But in this country it has been carefully provided otherwise. In the formation of our national government, our fathers were surrounded with peculiar difficulties arising out of their novel, I may say unexampled, condition. In resolving to break the ties which had bound them to the British empire, their complaints were levelled chiefly at the king, not the parliament nor the people. They seem to have been actuated by a special dread of the unity of power; and hence, in framing the constitution, they preferred to take the risk of leaving some good undone, for lack of power in the agent, rather than arm any government officer with such great powers for evil as are implied in the dictatorial charge to "see that no damage comes to the commonwealth."

Hence, keeping the sovereignty always out of sight, they adopted the plan of "checks and balances," forming separate departments of government, and giving to each department separate and limited powers. These departments are co-ordinate and coequal; that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together. We have three of these co-ordinate departments. Now, if we allow one of the three to determine the extent of its own powers, and also the extent of the powers of the other two, that one can control the whole government, and has, in fact, achieved the sovereignty.

We ought not to say that our system is perfect, for its defects (perhaps inevitable in all human things) are obvious. Our fathers, having divided the government into co-ordinate departments, did not even try (and if they had tried would

probably have failed) to create an arbiter among them to adjudge their conflicts and keep them within their respective bounds. They were left, by design, I suppose, each independent and free, to act out its own granted powers, without any ordained legal superior possessing the power to revise and reverse its action. And this with the hope that the three departments, mutually coequal and independent, would keep each other within their proper spheres by their mutual antagonism; that is, by the system of checks and balances to which our fathers were driven, at the beginning, by their fear of the unity of power.

In this view of the subject, it is quite possible for the same identical question (not case) to come up legitimately before each one of the three departments, and be determined in three different ways, and each decision stand irrevocable, binding upon the parties to each case; and that, for the simple reason that the departments are co-ordinate, and there is no ordained legal superior, with power to revise and reverse their decisions.

To say that the departments of our government are co-ordinate, is to say that the judgment of one of them is not binding upon the other two, as to the arguments and principles involved in the judgment. It binds only the parties to the case decided. But if, admitting that the departments of government are co-ordinate, it be still contended that the principles adopted by one department in deciding a case properly before it, are binding upon another department, that obligation must of necessity be reciprocal; that is, if the president be bound by the principles laid down by the judiciary, so also is the judiciary bound by the principles laid down by the president. And thus we shall have the theory of constitutional government flatly contradicting itself. Departments co-ordinate and coequal, and yet reciprocally subordinate to each other! That cannot be. The several departments, though far from sovereign, are free and independent in the exercise of the limited powers granted to them respectively by the constitution. Our government, indeed, as a whole, is not vested with the sovereignty, and does not possess all the powers of the nation. It has no powers but such as are granted by the constitution; and many powers are expressly withheld. The nation certainly is coequal with all other nations, and has equal powers, but it has not chosen to delegate all its

powers to this government, in any or all of its departments.

The government, as a whole, is limited, and limited in all its departments. It is the special function of the judiciary to hear and determine cases, not to "establish principles" nor "settle questions," so as to conclude any person, but the parties and privies to the cases adjudged. Its powers are specially granted and defined by the constitution, art. 3, § 2.

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, and which shall be made, under their authority; to all cases affecting ambassadors, other ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between states and citizens of other states; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects." And that is the sum of its powers, ample and efficient for all the purposes of distributive justice among individual parties, but powerless to impose rules of action and of judgment upon the other departments. Indeed, it is not itself bound by its own decisions, for it can and often does overrule and disregard them, as in common honesty it ought to do, whenever it finds, by its after and better lights, that its former judgments were wrong.

Of all the departments of the government, the president is the most active, and the most constant in action. He is called "the executive;" and so in fact, he is, and much more also, for the constitution has imposed upon him many important duties, and granted to him great powers which are in their nature not executive; such as the veto power; the power to send and receive ambassadors; the power to make treaties, and the power to appoint officers. This last is not more an executive power when used by the president than it is when exercised by either house of congress, by the courts of justice, or by the people at large.

The president is a department of the government; and, although the only department which consists of a single man, he is charged with a greater range and variety of

powers and duties than any other department. He is a civil magistrate, not a military chief; and in this regard we see a striking proof of the generality of the sentiment prevailing in this country at the time of the formation of our government, to the effect that the military ought to be held in strict subordination to the civil power; for the constitution, while it grants to congress the unrestricted power to declare war, to raise and support armies, and to provide and maintain a navy, at the same time guards carefully against the abuse of that power, by withholding from congress and from the army itself the authority to appoint the chief commander of a force so potent for good or for evil to the state. The constitution provides that "the president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." And why is this? Surely not because the president is supposed to be, or commonly is, in fact, a military man, a man skilled in the art of war and qualified to marshal a host in the field of battle. No, it is for quite a different reason; it is that whatever skilful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still, he is subject to the orders of the civil magistrate, and he and his army are always "subordinate to the civil power."

And hence it follows, that whenever the president, (the civil magistrate,) in the discharge of his constitutional duty to "take care that the laws be faithfully executed," has occasion to use the army to aid in the performance of that duty, he does not thereby lose his civil character and become a soldier, subject to military law and liable to be tried by a court-martial, any more than does a civil court lose its legal and pacific nature and become military and belligerent, by calling out the power of the county to enforce its decrees. The civil magistrates, whether judicial or executive, must of necessity employ physical power to aid them in enforcing the laws, whenever they have to deal with disobedient and refractory subjects; and their legal power and right to do so are unquestionable. The right of the courts to call out the whole power of the county to enforce their judgments, is as old as the common law; and the right of the

president to use force in the performance of his legal duties is not only inherent in his office, but has been frequently recognised and aided by congress. One striking example of this is the act of congress of March 3, 1807, (2 Stat. at Large, 445,) which empowered the president, without the intervention of any court, to use the marshal, and, if he be insufficient, to use the army, summarily to expel intruders and squatters upon the public lands. And that power has been frequently exercised, without, as far as I know, a question of its legality. To call, as is sometimes done, the judiciary the civil power, and the president the military power, seems to me at once a mistake of fact and an abuse of language.

While the judiciary and the president, as departments of the general government, are co-ordinate, equal in dignity and power, and equally trusted by the law, in their respective spheres, there is, nevertheless, a marked diversity in the character of their functions and their modes of action. The judiciary is, for the most part, passive. It rarely, if ever, takes the initiative; it seldom or never begins an operation. Its great function is judgment, and, in the exercise of that function, it is confined almost exclusively to cases not selected by itself, but made and submitted by others. The president, on the contrary, by the very nature of his office, is active; he must often take the initiative; he must begin operations. His great function is execution, for he is required by the constitution (and he is the only department that is so required) to "take care that the laws (all the laws) be faithfully executed," and in the exercise of that function, his duties are coextensive with the laws of the land.

Often, he comes to the aid of the judiciary, in the execution of its judgments; and this is only a part, and a small part, of his constitutional duty, to take care that the laws be faithfully executed. I say it is a small part of his duty, because for every instance in which the president executes the judgment of a court, there are a hundred instances in which he executes the law, without the intervention of the judiciary, and without referring at all to its functions.

I have premised this much in order to show the separate and independent character of the several departments of our government, and to indicate the inevitable differences in their modes of action, and the characteristic diversity of

the subjects upon which they operate; and all this as a foundation for the answers which I will now proceed to give to the particular questions propounded to me.

As to the first question, I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the president has the lawful, discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause of suspicion of such criminal complicity. And I think this position can be maintained, in view of the principles already laid down, by a very plain argument.

The constitution requires the president, before he enters upon the execution of his office, to take an oath that he "will faithfully execute the office of president of the United States, and will, to the best of his ability, preserve, protect, and defend the constitution of the United States."

The duties of the office comprehend all the executive power of the nation, which is expressly vested in the president by the constitution, article 2, § 1, and also, all the powers which are specially delegated to the president, and yet are not, in their nature, executive powers; for example, the veto power; the treaty-making power; the appointing power; the pardoning power. These belong to that class which, in England, are called prerogative powers, inherent in the crown. And yet the framers of our constitution thought proper to preserve them, and to vest them in the president, as necessary to the good government of the country. The executive powers are granted generally, and without specification; the powers not executive are granted specially, and for purposes obvious in the context of the constitution. And all these are embraced within the duties of the president, and are clearly within that clause of his oath which requires him to "faithfully execute the office of president."

The last clause of the oath is peculiar to the president. All the other officers of the government are required to swear only "to support this constitution;" while the president must swear to "preserve, protect, and defend" it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to "take care that the laws be faithfully executed." And this injunction, em-

bracing as it does all the laws, — constitution, treaties, statutes, — is addressed to the president alone, and not to any other department or officer of the government. And this constitutes him, in a peculiar manner, and above all other officers, the guardian of the constitution, — its preserver, protector, and defender.

It is the plain duty of the president (and his peculiar duty, above and beyond all other departments of the government) to preserve the constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the general government. The duty to suppress the insurrection being obvious and imperative, the two acts of congress, of 1795 and 1807, come to his aid, and furnish the physical force which he needs, to suppress the insurrection and execute the laws. Those two acts authorize the president to employ for that purpose the militia, the army, and the navy.

The argument may be briefly stated thus: It is the president's bounden duty to put down the insurrection, as (in the language of the act of 1795) the "combinations are too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." And this duty is imposed upon the president for the very reason that the courts and the marshals are too weak to perform it. The manner in which he shall perform that duty is not prescribed by any law, but the means of performing it are given in the plain language of the statutes, and they are all means of force,—the militia, the army, and the navy. The end, the suppression of the insurrection, is required of him; the means and instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed, and could not be prescribed without a foreknowledge of all the future changes and contingencies of the insurrection. He is therefore necessarily thrown upon his discretion as to the manner in which he will use his means to meet the varying exigencies as they arise. If the insurgents assail the nation with an army, he may find it best to meet them with an army, and suppress the insurrection on the field of battle. If they seek to prolong the rebellion, and gather strength by intercourse with foreign nations, he may choose to guard the coast and close the ports with a navy, as one

of the most efficient means to suppress the insurrection. And if they employ spies and emissaries to gather information, to forward secret supplies, and to excite new insurrections in aid of the original rebellion, he may find it both prudent and humane to arrest and imprison them. And this may be done either for the purpose of bringing them to trial and condign punishment for their crimes, or they may be held in custody for the milder end of rendering them powerless for mischief until the exigency is past.

In such a state of things the president must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to apply the powers entrusted to him, to enable him to discharge his constitutional and legal duty; that is, to suppress the insurrection and execute the laws. And this discretionary power of the president is fully admitted by the supreme court in the case of *Martin* v. *Mott.* 12 Wheat. 19; 7 Curtis, 10.

This is a great power in the hands of the chief magistrate; and because it is great, and is capable of being perverted to evil ends, its existence has been doubted or denied. It is said to be dangerous in the hands of an ambitious and wicked president, because he may use it for the purposes of oppression and tyranny. Yes, certainly it is dangerous; all power is dangerous, and for the all-pervading reason that all power is liable to abuse; all the recipients of human power are men, not absolutely virtuous and wise. Still, it is a power necessary to the peace and safety of the country, and undeniably belongs to the government, and therefore must be exercised by some department or officer thereof.

Why should this power be denied to the president, on the ground of its liability to abuse, and not denied to the other departments on the same ground? Are they more exempt than he is from the frailties and vices of humanity? Or are they more trusted by the law than he is trusted, in their several spheres of action? If it be said that a president may be ambitious and unscrupulous, it may be said with equal truth that a legislature may be factious and unprincipled, and a court may be venal and corrupt. But these are crimes never to be presumed, even against a private man, and much less against any high and highly trusted public functionary. They are crimes, however,

recognised as such, and made punishable by the constitution; and whoever is guilty of them, whether a president, a senator, or a judge, is liable to impeachment and condemnation.

As to the second question: Having assumed, in answering the first question, that the president has the legal discretionary power to arrest and imprison persons who are guilty of holding criminal intercourse with men engaged in a great and dangerous insurrection, or persons suspected with "probable cause" of such criminal complicity, it might seem unnecessary to go into any prolonged argument to prove that in such a case the president is fully justified in refusing to obey a writ of *habeas corpus*, issued by a court or judge, commanding him to produce the body of his prisoner, and state when he took him, and by what authority, and for what cause he detains him in custody, and then yield himself to judgment, "to do, submit to, and receive whatsoever the judge or court, awarding the writ, shall consider in that behalf."

If it be true, as I have assumed, that the president and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the president to come before him *ad subjiciendum*, that is, to submit implicitly to his judgment, and in case of disobedience, treat him as a criminal, in contempt of a superior authority, and punish him as for a misdemeanor, by fine and imprisonment. It is no answer to say, as has sometimes been said, that although the writ of *habeas corpus* cannot be issued and enforced against the president himself, yet that it can be against any of his subordinates; for that abandons the principle assumed, of giving relief in "all cases" of imprisonment by color of authority of the United States, and attempts to take an untenable distinction, between the person of the president and his office and legal power. The law takes no such distinction, for it is no respecter of persons. The president, in the arrest and imprisonment of men, must, almost always, act by subordinate agents, and yet the thing done is no less his act than if done by his own hand. But it is possible for the president to be in the actual custody of a prisoner, taken in civil war, or arrested on suspicion of being a secret agent and abettor of rebellion, and in that case the

writ must be unavailing, unless it run against the president himself. Besides, the whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation, and to establish another political government upon its ruins. And the president, as the chief civil magistrate of the nation, and the most active department of the government, is eminently and exclusively political in all his principal functions. As the political chief of the nation, the constitution charges him with its preservation, protection, and defense; and requires him to take care that the laws be faithfully executed. And in that character, and by the aid of the acts of congress of 1795 and 1807, he wages open war against armed rebellion, and arrests and holds in safe custody those whom, in the exercise of his political discretion, he believes to be friends of, and accomplices in, the armed insurrection which it is his especial political duty to suppress. He has no judicial powers. And the judiciary department has no political powers, and claims none, and therefore (as well as for other reasons already assigned) no court or judge can take cognizance of the political acts of the president, or undertake to revise and reverse his political decisions.

The jurisdiction exercised under the writ of *habeas corpus* is in the nature of an appeal (4 Cr. 75), for, as far as concerns the right of the prisoner, the whole object of the process is to re-examine and reverse or affirm the acts of the person who imprisoned him. And I think it will hardly be seriously affirmed that a judge at chambers can entertain an appeal, in any form, from a decision of the president of the United States, and especially in a case purely political.

There is but one sentence in the constitution which mentions the writ of *habeas corpus*, article 1, section 9, clause 2, which is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

Very learned persons have differed widely about the meaning of this short sentence, and I am by no means confident that I fully understand it myself. The sententious language of the constitution, in this particular, must, I suppose, be interpreted with reference to the origin of our people, their historical relations to the mother country, and

their inchoate political condition at the moment when our constitution was formed. At that time the United States, as a nation, had no common law of its own, and no statutory provision for the writ of *habeas corpus*. Still, the people, English by descent, even while in open rebellion against the English crown, claimed a sort of historical right to the forms of English law, and the guarantees of English freedom. They knew that the English government had, more than once, assumed the power to imprison whom it would, and hold them for an indefinite time beyond the reach of judicial examination; and they desired, no doubt, to interpose a guard against the like abuses in this country; and hence the clause of the constitution now under consideration. But we must try to construe the words, vague and indeterminate as they are, as we find them. "The privilege of the writ of *habeas corpus* shall not be suspended," &c. Does that mean that the writ itself shall not be issued, or, that being issued, the party shall derive no benefit from it? Suspended, — does that mean delayed, hung up for a time, or altogether denied? The writ of *habeas corpus*, — which writ? In England, there were many writs called by that name, and used by the courts for the more convenient exercise of their various powers; and our own courts now, by acts of congress, — the judiciary act of 1789, § 14, and the act of March 2, 1833, § 7, — have, I believe, equivalent powers.

It has been decided by the supreme court, and I doubt not correctly, — see Bollman Swartwout's case, (4 Cr. 93,) that "for the meaning of the term *habeas corpus*, resort must be had to the common law; but the power to award the writ, by any of the courts of the United States, must be given by written law." And the same high court (judging, no doubt, by the history of our people, and the circumstances of the times) has also decided that the writ of *habeas corpus*, mentioned in the constitution, is the great writ *ad subjiciendum*.

That writ, in its nature, action, and objects, is tersely and accurately described by Sir William Blackstone. I adopt his language, as found in his Commentaries, book 3, p. 131. "But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause

of his caption and detention, *ad faciendum, subjiciendum et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law, issuing out of the court of king's bench, not only in term time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

Such is the writ of *habeas corpus*, of which the constitution declares that the privilege thereof shall not be suspended, except when, in cases of rebellion or invasion, the public safety may require it. But the constitution is silent as to who may suspend it when the contingency happens. I am aware that it has been declared by the supreme court that, "if at any time the public safety should require the suspension of the powers vested by this act (meaning the judiciary act of 1789, section 14), in the courts of the United States, it is for the legislature to say so. That question depends upon political considerations, on which the legislature is to decide." Upon this, I remark only that the constitution is older than the judiciary act, and yet it speaks of the privilege of the writ of *habeas corpus* as a thing in existence; it is in general terms, and does not speak with particular reference to powers which might or might not be granted by a future act of congress. Besides, I take it for certain that, in the common course of legislation, congress has power at any time to repeal the judiciary act of 1789 and the act of 1833 (which grants to the courts and the judges the power to issue the writs), without waiting for a rebellion or invasion, and a consequent public necessity, to justify, under the constitution, the suspension of the privilege of the writ of *habeas corpus*. The court does not speak of suspending the privilege of the writ, but of suspending the powers vested in the court by the act. The power to issue a writ can hardly be called a privilege; yet the right of an individual to invoke the protection of his government in that form may well be designated by that name. And I should infer, with a good deal of confidence, that the court meant to speak only of its own powers, and not of the privilege of individuals, but for the fact

that the court ascribes the power to suspend to the legislature upon political grounds. It says, "that question depends upon political considerations, on which the legislature is to decide." Now, I had supposed that questions did not belong exclusively to the legislature, because they depend upon political considerations, inasmuch as the president, in his constitutional and official duties, is quite as political as is the congress, and has daily occasion in the common routine of affairs to determine questions upon political considerations alone.

If by the phrase, the suspension of the privilege of the writ of *habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but congress can do it. But if we are at liberty to understand the phrase to mean that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion that the president has lawful power to suspend the privilege of persons arrested under such circumstances; for he is especially charged by the constitution with the "public safety," and he is the sole judge of the emergency which requires his prompt action.

This power in the president is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency, when the judiciary is found to be too weak to insure the public safety; when (in the language of the act of congress) there are "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." Then, and not till then, has he the lawful authority to call to his aid the military power of the nation, and with that power perform his great legal and constitutional duty to suppress the insurrection. And shall it be said that, when he has fought and captured the insurgent army, and has seized their secret spies and emissaries, he is bound to bring their bodies before any judge who may send him a writ of *habeas corpus*, "to do, submit to, and receive whatsoever the said judge shall consider in that behalf?"

I deny that he is under any obligation to obey such a writ, issued under such circumstances. And in making this denial, I do but follow the highest judicial authority of the nation. In the case of *Luther* v. *Borden* (commonly called

the Rhode Island case), 7 How. p. 1, the supreme court discussed several of the most important topics treated of in this opinion, and among them the power of the president alone to decide whether the exigency exists, authorizing him to call out the militia, under the act of 1795. The court affirmed the power of the president in that respect, and denied the power of the court to examine and adjudge his proceedings. The opinion of the court, delivered by the learned Chief Justice Taney, declares that if the court had that power, "then it would become the duty of the court (provided that it came to the conclusion that the president had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the president was endeavoring to maintain. If (says that learned court) the judicial power extends so far, the guarantee contained in the constitution of the United States (meaning, of course, protection against insurrection) is a guarantee of anarchy, and not of order."

Whatever I have said about the suspension of the privilege of the writ of *habeas corpus*, has been said in deference to the opinions of others, and not because I myself thought it necessary to treat of that subject at all in reference to the present posture of our national affairs. For, not doubting the power of the president to capture and hold by force insurgents in open arms against the government, and to arrest and imprison their suspected accomplices, I never thought of first suspending the writ of *habeas corpus*, any more than I thought of first suspending the writ of *replevin*, before seizing arms and munitions destined for the enemy.

The power to do these things is in the hand of the president, placed there by the constitution and the statute law, as a sacred trust, to be used by him, in his best discretion, in the performance of his great first duty, — to preserve, protect, and defend the constitution. And for any breach of that trust he is responsible before the high court of impeachment, and before no other human tribunal.

The powers of the president falling within this general class have been several times considered by the judiciary, and have, I believe, been uniformly sustained, without materially varying from the doctrines laid down in this opinion. I content myself with a simple reference to the cases without encumbering this document, already too long,

with copious extracts. *Luther* v. *Borden*, 7 How. 1; *Fleming* v. *Page*, 9 *ib.* 615; *Cross* v. *Harrison*, 16 *ib.* 189; *The Santissima Trinidad*, 7 Wheat. 305; *Martin v. Mott*, 12 *ib.* 29.

To my mind, it is not very important whether we call a particular power exercised by the president a peace power or a war power, for, undoubtedly, he is armed with both. He is the chief civil magistrate of the nation, and being such, and because he is such, he is the constitutional commander-in-chief of the army and navy; and thus, within the limits of the constitution, he rules in peace and commands in war, and at this moment he is in the full exercise of all the functions belonging to both those characters. The civil administration is still going on in its peaceful course, and yet we are in the midst of war; a war in which the enemy is, for the present, dominant in many States, and has his secret allies and accomplices scattered through many other States which are still loyal and true; a war all the more dangerous, and more needing jealous vigilance and prompt action, because it is an internecine and not an international war.

This, sir, is my opinion, the result of my best reflections, upon the question propounded by you. Such as it is, it is submitted, with all possible respect, by your obedient servant,

EDWARD BATES,
Attorney-General.

To the President.

District Court of the United States for the District of Columbia. June Term, 1861, in Admiralty.

The Schooner Tropic Wind and Cargo.

Blockade — Forfeiture of property of neutral — Practice — Further proof.

Where war exists, the president of the United States has the constitutional authority, as a belligerent right, without any act of congress, to institute and declare a blockade.

The president of the United States having by his proclamations, with the assertion of the right of blockade, declared in substance that a state of civil war existed, and blockade being a belligerent right incident to a state of war, the blockade of the ports of Virginia was lawfully proclaimed by the president.

The blockade of the ports of Virginia became effective on a certain day; fifteen days from that date were allowed to neutral vessels to leave

those ports, with or without cargoes; the Tropic Wind sailed from the port within the fifteen days, but with a cargo that was put on board after notice to her that the blockade had become effective; *held* that both vessel and cargo were thereby forfeited.

After the court had prepared its opinion upon the proofs and papers in its possession, deciding that a forfeiture had been incurred, an *ex parte* suggestion was made by the counsel for the claimant to the effect that the whole correspondence (a part of which was in the case) would show that the strictness of the blockade had been relaxed; and the court allowed the case to stand open for "further proof" upon this single point.

The facts in this case sufficiently appear in the opinion of the court by Judge Dunlop.

The points made by Mr. Carlisle, of counsel for the owners of the vessel and cargo, were as follows: —

1. A blockade, under the law of nations, must be the act of a belligerent. There must be a public war. If a sovereign close certain of his own ports on account of domestic disturbances, and interdict all commerce with them, upon certain penalties and forfeitures, this is not blockade under the law of nations, but municipal legislation or decree of the sovereign. This distinction is taken by the supreme court in the case of Rose and Himely, 4 Cranch, where, the Island of St. Domingo being in a state of revolt, a decree similar to that of the president's proclamation was made by the authority of the French Republic. The court held that the capture in that case was not *jure belli*, but was *jure civili*. There is no repugnancy between the two rights, belligerent and of sovereignty. One may be superadded to the other. But, by the authority of the same case and others, it is to be determined by the acts and declarations of the sovereign himself, in which character he is acting, whether simply enforcing his own authority upon his own subjects and within his own jurisdiction, or carrying on a public war; whether a war between independent nations, or a civil war, which is still a war, recognised by the *jus gentium* as entitling both parties to all the rights of belligerents as to other nations.

2. If the sovereign power had proclaimed and instituted this blockade, the case would then be parallel with that cited from 4 Cranch. But in this case the sovereign has not acted, unless the president be an absolute monarch. This case arises in a court of justice, by the libel of the government and the captors, who ask a decree of condemnation. The court is held under the constitution and laws of the United States. Political neces-

sity, or the temporary will of the people to suspend the constitutional government, and in its place to erect a dictatorship for the preservation of the Union, however justifiable elsewhere, can have no standing in this court. This is the act of the president. Is it an act of war? The answer is, that by the constitution congress alone can declare or recognise war? Is it a municipal decree? The answer is equally clear, — the president has no legislative or sovereign powers or attributes.

3. Taking the case either way, and admitting the power, the terms of the proclamations of the 19th and 27th April clearly show that the act is one which studiously disclaims and denies any actual war, or any belligerent rights in the states blockaded. It is, therefore, no case of capture *jure belli*.

4. Whether war exists or not is a political question which is to be answered exclusively and conclusively, as to the courts of the United States, by the executive government of the United States, and not by the opinion of court or bar, or that of all the foreign nations. This is firmly settled by the Supreme Court of the United States. *United States* v. *Palmer*, 3 Wheat. 463; *Foster* v. *Neilson*, 2 Pet. 253; *Williams* v. *Suffolk Insurance Company*, 13 Pet. 415, and *Luther* v. *Borden*, 7 How. 1, — the case of Dorr's rebellion. All the public acts of the executive pronounce this to be no case of war. The southern confederacy is not recognised as a government *de facto*. Those in arms under that supposed authority are merely rebels and traitors on land and pirates on the seas. It is true that Great Britain, to whom this ship belongs, appears to think differently. But this court takes the political status in question absolutely and solely from the executive government of the United States. The other nations judge for themselves, and their courts follow them.

5. This proclamation assumes to annul the existing treaties with Great Britain by closing a large portion of the ports of the Union. There is, at all events, no war with Great Britain, regular or irregular. The president can neither make nor unmake a treaty. Ports of entry created by act of congress can only cease to be such by the exercise of the same power. These ports being by the theory of the government, in the Union, by what authority are they blockaded? By what authority are neutrals excluded?

But, 6. Waiving these points, *argumenti gratia*, here was no breach of blockade. The schooner neither went into Norfolk nor passed nor attempted to pass the blockade of Hampton Roads. She was lying at anchor at the mouth of James River. The blockade was to prevent ingress from the sea and egress to the sea. This is clear from the notice given by Com. Pendergrast. The mere intention is no breach of the blockade. [Wheaton on Captures, 193–4, Cranch, 186.] But there was no intention to run the blockade. It is clear on the proof that the consul and the master thought she might lawfully proceed to sea, having cleared from Richmond within the fifteen days, and with reason. Such was evidently the extent of the privilege, which otherwise was vain.

7. The cargo is not liable to condemnation, if all the foregoing points are for the captors. It was owned in Liverpool, before the blockade. The master is not agent for the owners. Nor is the shipping merchant in the blockaded port. His interests, as well private as for the government *de facto*, are against the owners. He will ship without regard to risk, to make his commissions, and to benefit the state by exporting her produce. There was no time to countermand the order. [Wheaton on Captures, 203 and 209.]

The written opinion of Judge Dunlop is as follows:—

A libel has been filed by the United States and the captors in this court, sitting in admiralty, to condemn as prize the English schooner Tropic Wind and cargo, valued at $22,000, for violating a blockade of the ports of Virginia, proclaimed by the president of the United States on the 27th April, 1861.

The capture was made in or near the mouth of James River, by the United States ship Monticello, on the 21st May, 1861. The blockade of the port of Richmond, Virginia, into which port the Tropic Wind had entered before the proclamation, is alleged to have been made effective on the 30th April, and notice of it brought home to the captain of the Tropic Wind and the British consul, at Richmond, at least as early as the 2d of May. Fifteen days were allowed by the United States to neutral vessels to leave the blockaded port of Richmond, from the 30th April, the day of the effective blockade.

It appears that the Tropic Wind commenced to load her cargo at Richmond, Virginia, on the 13th of May, completed her lading on the 14th May, and sailed from Richmond the same day, bound for Halifax, Nova Scotia.

Mr. Carlisle appeared for the vessel and cargo, filed the answer of the captain, and the case has been argued and submitted to me on the libel, answer, evidence taken *in preparatorio*, and official documents.

The authority of the president to institute the blockade is denied by the respondents, who insist that this power, under the constitution of the United States, can only be exercised by the national legislature. And this is the first question to be considered.

It is true, no department of the federal government can exercise any power not expressly conferred on it by the constitution of the United States, or necessary to give effect to granted powers; all others are reserved to the states respectively, or to the people. In the second article, second section of the constitution of the United States, is this provision: "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States."

In the war with Mexico, declared by congress to exist by the act of Mexico, (9th Stat. at Large, 9,) the supreme court have maintained, in two cases, that the president, without any act of congress, as commander-in-chief of the army and navy, could exert the belligerent right of levying contributions on the enemy to annoy and weaken him. In the case of *Fleming et al.* v. *Page*, (9 How. 615,) the present chief justice says: "As commander-in-chief, he is authorized to direct the movements of the naval and military forces, placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Again, at page 616: "The person who acted in the character of collector, in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the president in his character of commander-in-chief. The custom-house was established in an enemy's country as one of the weapons of war. It was established, not

for the purpose of giving the people of Tamaulipas the benefit of commerce with the United States, or with other countries, but as a measure of hostility and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico and make it feel the evils and the burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country."

The other case to which I allude is *Cross et al.* v. *Harrison*, (16th How. 189, 190.) Judge Wayne, in delivering the opinion of the supreme court, says: "Indeed, from the letter of the secretary of state, and from that of the secretary of the treasury, we cannot doubt that the action of the military governor of California was recognised as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recognition under all the circumstances; and when we say rightful, we mean that it was constitutional, although congress had not passed an act to extend the collection of tonnage and import duties to the ports of California. California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterwards the United States had military possession of all the Upper California. Early in 1847 the president, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army, which had the conquest in possession, &c. No one can doubt that these orders of the president, and the action of our army and navy commanders in California, in conformity with them, was according to the law of arms," &c.—(See also pages 191, 193, 195, 196, 201.)

Blockade is a belligerent right under the law of nations where war exists, and is as clearly defined as the belligerent right to levy contributions in the enemy's country. As the supreme court hold the latter power to be con-

stitutionally in the president, without an act of congress, as commander-in-chief of the army and navy, it follows necessarily that the power of blockade also resides with him; indeed, it would seem a clearer right, if possible, because, as chief of the navy, nobody can doubt the right of its commander to order a fleet or a ship to capture an enemy's vessel at sea, or to bombard a fortress on shore, and it is only another mode of assault and injury to the same enemy to shut up his harbors and close his trade by the same ship or fleet. The same weapons are used. The commander only varies the mode of attack.

In the 1st article, section 8, clause 11, of the constitution, under the legislative head, power is granted to congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." These powers are therefore solely confided to and within the control of the legislature, and cannot be exercised by the president. The president cannot declare war, grant letters of marque, &c., though all other belligerent rights, arising out of a state of war are vested in him as commander-in-chief of the army and navy. But war declared by congress is not the only war within the contemplation of the constitution. In clause 15, article 1, section 8, among the legislative powers is this, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and the legislature, in execution of this power, passed the act of 1795, (1st Stat. at Large, 424,) vesting in the president, under the terms set forth in the statute, discretionary power over the militia in the cases enumerated in this 15th clause of section 8, article 1. The *status* of foreign nations whose provinces or dependencies are in revolution, foreign invasion of our own country, and insurrection at home are political questions, determinable by the executive branch of our government. I refer on this subject to the following cases in the Supreme Court of the United States. In The Santissima Trinidad, (7th Wheat. 305,) the court says: "This court has repeatedly decided that it will not undertake to determine who are sovereign states, but will leave that question to be settled by the other departments who are charged with the external affairs of the country, and the relations of peace and war. It may, however, be said that both the judiciary and the

executive have concurred in affirming the sovereignty of the Spanish colonies, now in revolt against the mother country. But the obvious answer to this objection is, that the court, following the executive department, have merely declared the notorious fact that a civil war exists between Spain and her American provinces, and this, so far from affirming, is a denial of the sovereignty of the latter. It would be a public and not a civil war if they were sovereign states. The very object of the contest is to decide whether they shall be sovereign and independent or not; all that the court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other."

In cases of invasion by a foreign power or insurrection at home, in which cases, under the act of 1795, the president may call out the militia, the supreme court, in *Martin* v. *Mott*, (12 Wheat. 29, 30,) says it is exclusively with the president to decide whether the exigencies provided for have arisen. These, also, are political questions, determinable by the executive alone, and the courts follow that branch of the government. In this case, at page 32, the supreme court say: "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself."

Whether insurrection has grown to such a head, has become so formidable in power as to have culminated in civil war, it seems to me, must also belong, as to its decision, to the same political branch of the government. The president, in his proclamations relating to the blockade of the ports of the confederate states, alleges that nine states have so resisted, and have threatened to issue letters of marque to authorize the bearers thereof to commit assaults against the vessels, property, and lives of citizens engaged in commerce on the high seas and in the waters of the United States, and that he has "deemed it advisable to set on foot a blockade of the ports within the states aforesaid, in pursuance of the United States and of the law of nations in such case provided;" and in his subsequent proclamation states that whereas since the date of his former proclamation "public property has been seized, the collection of the revenue obstructed, and duly commis-

sioned officers of the United States, while engaged in executing the orders of their superiors, have been arrested and held in custody as prisoners, or have been impeded in the discharge of their official duties, without due legal process, by persons claiming to act under authorities of the states of Virginia and North Carolina, an efficient blockade of the ports of those states will also be established."

These facts, so set forth by the president, with the assertion of the right of blockade, amount to a declaration that civil war exists.

Blockade itself is a belligerent right, and can only legally have place in a state of war; and the notorious fact that immense armies, in our immediate view, are in hostile array against each other in the federal and confederate states, the latter having organized a government and elected officers to administer it, attest the executive declaration that civil war exists; a sad war, which, if it must go on, can only be governed by the laws of war, and its evils mitigated by the principles of clemency engrafted upon the war code by the civilization of modern times.

Nor does the assertion of the right in the proclamation of the 19th April, 1861, to proceed against privateersmen under the laws of the United States, as pirates, militate against the construction I have above given of the two proclamations as averring the existence of civil war.

In the case of *Rose* v. *Himely*, 4th Cranch, 272–3, Chief Justice Marshall, in delivering the opinion of the court, says: "It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law and the proceedings under it will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

In this case I am sitting in admiralty, adjudging a question of prize, under a capture, for alleged violation of blockade.

I do not find, on examination of the writers on public law, any difference as to belligerent rights in civil or foreign war, and Judge Story, in 7th Wheaton, as heretofore cited by me, says they are the same. Blockade being one of the rights incident to a state of war, and the president, having in substance asserted civil war to exist, I am of opinion that the blockade was lawfully proclaimed by the executive.

The next inquiry is, when did the blockade become effective, and, as such, come to the knowledge of the respondents or their government? Notice, actual or constructive, will do. In the present case, Flag Officer Pendergrast, commanding the home squadron, officially announced the blockade of the ports of Virginia, whose outlet was Hampton Roads, as effective on the 30th April, 1861, and the secretary of the navy, in his letter of the 9th May, 1861, states this notice was sent to the Baltimore and Norfolk papers, and by one or more of them published. In a certificate of the British consul at Richmond, dated 14th of May, 1861, found on board the Tropic Wind at the time of her capture, he states he had received an authoritative communication of the 11th May, which he immediately communicated to the captains of British merchant vessels and others interested in British trade, that fifteen days would be allowed to leave port after the actual commencement of the blockade, with or without cargoes, "and whether the cargoes were shipped before or after the commencement of the blockade," and that upon inquiry he found the 2d of May, 1861, to be the day when the efficient blockade began.

There does not appear in the cause any evidence to show that the United States government agreed to relax the law of blockade so as to allow British vessels to load cargoes and come out of port after knowledge of effective blockade was brought home to them. The letter of Mr. Welles to Mr. Seward of date 9th of May, 1861, in answer to inquiries of Lord Lyons, relative to British vessels in Virginia ports and the operation of the blockade upon them, &c., and which, it must be presumed, was sent to Lord Lyons, does not contain the relaxation of the law of blockade referred to in the British consul's certificate of the 14th May, 1861; by which, I mean, that it contains no permission to British vessels to come out of port, within

the fifteen days, with cargoes laden on board after notice of commencement of effective blockade. I give an extract from that letter of the 9th May, 1861: "Fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo, and there are yet remaining five or six days for neutrals to leave; with proper diligence on the part of persons interested, I see no reason for exemption to any." It also appears in the evidence of the master, Layton, that he heard in Richmond of the blockade as effective before he began to load his cargo, and was informed it commenced on the 2d of May.

All the testimony concurs in showing that the cargo was laden on board the Tropic Wind on the 13th and 14th days of May, 1861. No principle of prize law seems better settled than that such lading violates the blockade and forfeits both vessel and cargo. In "Weldman on Search, Capture and Prize," page 42, the act of egress is "as culpable as the act of ingress; and a blockade is just as much violated by a ship passing outwards as inwards. A blockade is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that, having already taken in a cargo before the blockade begins, she may be at liberty to retire with it. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade. It is lawful for a ship to withdraw from a blockaded port, in ballast, or with a cargo shipped *bona fide* before notice of the blockade. (See also *Vrow Judith*, Rob. 150; the *Juno*, 2d Rob. 119; the *Nossa Senhora*, 5th Rob. 52.) In Weldman's International Law, volume 2, page 205, we find this passage: "Where the blockade is known at the port of shipment, the master becomes an agent for the cargo; in such case the owners must at all events answer to the country imposing the blockade for the acts of persons employed by them; otherwise, by sacrificing the ship, there would be a ready escape for the cargo, for the benefit of which the fund was intended." (See, also, the *James Cook*, Edwards, 261; the *Arthur*, Edwards, 202; the *Exchange*, Edwards, 40, 1st Kent Comm. 2d ed. 144, 146; *Olivera* v. *Union Insurance Company*, 3d Wheat. 194. See, also, Wheaton's note to the same case.)

It follows, upon the case as it now stands, there must be condemnation of both vessel and cargo.

June 13, 1861. JAS. DUNLOP.

N. B. After I had written this opinion on the proofs and papers then before me, but before it was known or copied, I was requested by Mr. Carlisle, by note of the 14th, to ask of the state department the whole correspondence, a part of which only was in the cause; and, on Saturday evening, the 15th of June, the document A was handed to me. I have formed no opinion of the influence this further correspondence has on the legal aspect of the case; and, as the parties concerned on both sides have had no opportunity to see or comment on it, and may wish further proof as to the relaxation by the United States of the strict law of blockade, I will allow further proof to be taken by either party on this single point, and postpone any decision till the proof is in, and the counsel on both sides heard. This course is, I believe, consonant with prize practice.

June 17, 1861. JAMES DUNLOP.

Supreme Judicial Court of Massachusetts.

COMMONWEALTH *v.* ALEXANDER DESMARTEAU.

Since the Statute of this commonwealth of 1858, ch. 154, in relation to the crime of murder, the technical definition of murder is the same as the common law definition, as recognised by this court, was prior to that statute.

The statute of 1858, ch. 154, has not made any change necessary in the form of indictment for murder. The decision in Commonwealth *v.* Gardner, 23 Law Reporter, 470, affirmed and declared to be the settled law in this commonwealth.

Under that statute to constitute a murder "committed with extreme atrocity and cruelty," it is not incumbent on the government to show that the atrocity and cruelty were premeditated.

Certain facts stated as constituting a murder committed with extreme atrocity and cruelty.

Where such facts were recapitulated by the court to the jury, it is no valid objection that many of the facts so stated as subjects for the consideration of the jury are not set forth in the indictment. They may not have been the cause of death, yet have contributed materially to make the killing one of atrocity and extreme cruelty.

Where an indictment charged but one offence, and it was set forth in various counts adapted to meet the evidence, each of the counts being in technical form, aptly drawn, and setting forth all that is necessary to constitute a charge of murder, and to authorize a judgment and sentence therefor, the jury were properly instructed that if they found the prisoner guilty as set forth in either of the counts, they might return a verdict of guilty generally.

Where, in the first part of a count charging murder, the deadly and mortal bruises are stated to have been inflicted on Augustine, and it is alleged "that of the said mortal bruises and wounds the said Augustina died," — *Held* that this was not sufficient ground to sustain a motion in arrest of judgment.

The words "Augustine" and "Augustina" may be, and the words "Chicopee" and "Chickopee" are, *idem sonans*.

Where in an indictment there were several interlineations, and the abbreviation "sd." was used for said. *Held*, that they do not constitute a sufficient ground for arrest of judgment.

How far they would have been sufficient to sustain a motion to quash the indictment before the prisoner had pleaded or been put on his trial, *quære*.

Indictment for murder. The indictment contained three counts, the second of which was as follows: —

"And the jurors aforesaid, on their oath aforesaid, do present that the said Alexander Desmarteau, at Chickopee aforesaid, in the County of Hampden aforesaid, on the fifth day of November, in the year eighteen hundred and fifty-eight, in and upon one Augustine Lucas, of said Chickopee, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Alexander did then & there by some weapon & instrument to the jurors unknown the said Augustine upon the right side of the head and face, and upon the forehead and nose, and upon the left side of the head of her the said Augustine, then and there feloniously, wilfully, and of his malice aforethought, did strike and beat, giving unto the sd Augustine then and there with sd weapon and instrument to the jurors unknown by the strokes aforesaid, in the manner aforesaid, in and upon the right side of the head and face, and upon the forehead and nose, and upon the left side of the head of her the sd Augustine divers deadly and mortal bruises and wounds, of which said mortal bruises and wounds the said Augustina then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Alexander the said Augustine did then and there in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, kill and murder against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The other counts were in similar form. The first charged the murder to have been committed by casting and throwing and pushing the said Augustine into the Connecticut River, and so choking, suffocating, and drowning her. The

third charged the death to have been caused by the blows and drowning both, and alleged the wound to have been given "to the sd. Augustine upon the head and face and forehead of her the sd. Augustina;" and throughout the residue of both these counts the deceased was named "Augustine."

The defendant pleaded not guilty, and was tried at May term, 1860, before *Dewey*, *Bigelow*, *Merrick*, and *Hoar*, J.J., and convicted of murder in the first degree; and the following bill of exceptions was allowed by the court:—

"The defendant was indicted for the murder of Augustine Lucas, a female child under the age of eight years. The defendant claimed, upon the evidence, that the murder, if committed by him, was not committed with deliberately premeditated malice aforethought, and requested the court to rule that, if the murder was not deliberately premeditated, the jury could not find the defendant guilty of murder in the first degree, although committed with extreme atrocity or cruelty.

"The defendant also contended that to constitute murder in the first degree, by reason of its being committed with extreme atrocity or cruelty, the atrocity and cruelty must be premeditated, and if not so premeditated, it would be only murder in the second degree.

"The court instructed the jury that the technical definition of murder in this commonwealth was the common-law definition, as recognized by the courts of this commonwealth prior to the statute of 1858, ch. 154, — that the form of the indictment in a case of murder was the same, and no new allegations required in the same by reason of that statute, — that by the statute the jury have a further duty to perform, viz: to find whether the case be murder in the first or second degree. The case of murder in the first degree may be established in three different ways. First, murder committed with deliberately premeditated malice aforethought. Second, murder committed in the commission of an attempt to commit any crime punishable with imprisonment for life. Third, murder committed with extreme atrocity or cruelty. That these are so far independent provisions, that either of the three cases stated, if duly established by the evidence, would authorize the jury to return a verdict of murder in the first degree. That as to the first, in the very language of the statute, it requires "deliberately

premeditated malice aforethought" to be proved, and the counsel for the defendant has correctly defined those words as requiring the act to be done with a formed design and premeditation before the act, and that to premeditate was to think of it beforehand. That the jury would take the rule of law, as to the first mode stated as above, as was stated by the counsel for the defendant. That as to the second mode, as under the circumstances of the present case, it was not relied upon by the attorney-general, and the jury would not be required to pass upon it, no instructions were necessary. That as to the third mode stated, that of "murder committed with extreme atrocity or cruelty," it was relied upon by the counsel for the government, and would be a subject for their consideration, and they were instructed by the court that if they were satisfied by the evidence that the deceased, a girl under eight years of age, was by the persuasions of the prisoner enticed from the house of Mrs. Burlin, at or about six o'clock on the evening of the fifth of November, 1858, and the prisoner, having thus acquired the confidence of the child, and the possession of her person, at once proceeded to perpetrate upon her person the crime of rape, actually ravishing her body by force, and thereby inflicting severe wounds upon the private parts of her body, and, as a part of the same transaction, and for the purpose of concealing this crime and escaping punishment therefor, proceeded further to inflict numerous severe blows upon her head and face, and then to throw her body into the Connecticut River, and by these means caused her death, it would be competent for the jury to find the prisoner guilty of murder committed with extreme atrocity and cruelty, and a murder in the first degree.

The counsel for the prisoner asked that the jury might be instructed to render a verdict on the three counts in the indictment separately. But the court ruled that, there being but one offence charged, though set forth in various counts adapted to meet the evidence, if the jury found the prisoner guilty of the murder in either of the counts set forth, they may find him guilty generally.

It appeared by the evidence of the mother of the child, that the deceased was a French girl, formerly living in New York, and that she was there baptized by the name of Augustine Alexandrine, and also that on some former

period her name had been thus written in a book, to be kept by some of the family, or their friends. The parents of the child had some time since separated, and the child had not of late been living with her mother. Various witnesses, including the members of the family where her child was living at the time of the alleged murder, testified to the fact that, since her residence in this commonwealth, she had been always called and known by the name of Augustine only, and they never heard of her having any other name, and her mother being recalled, stated that her child was baptized Augustine Alexandrine, but she was called and known only by the name of Augustine. The counsel for the prisoner insisted that there was a variance in the name of the deceased, as stated in the indictment, and shown by the evidence. Upon that point the jury were instructed that the name of the party alleged to have been killed must be truly and properly stated in the indictment, but it is sufficiently stated if the name by which the person has been commonly known and called by all those who have known her, or had occasion to call her name, is the same as that stated in the indictment, and that the mere fact that the deceased, while an infant and resident of another state, was baptized by the name of Augustine Alexandrine, and that her name was thus entered on a family book, would not be fatal to the indictment, if the jury found the name set forth in the indictment corresponded with the name by which the deceased was generally known and called, agreeable to the rule above stated."

Together with this bill, was filed a motion in arrest of judgment, the important grounds for which sufficiently appear, in the opinion of the court delivered by

Dewey, J. The provisions of stat. 1858, ch. 154, have materially affected the course of proceedings in the case of a trial of a party charged with the crime of murder. Although the form of the indictment in such cases remains as heretofore adopted and sanctioned in this commonwealth, yet the punishment for the crime of murder is made to depend upon the finding of the jury whether it is murder in the first or second degree, and the jury are by the statute to find the degree of murder. Murder in the first degree is declared by this statute to be a "murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable

with imprisonment for life, or committed with extreme atrocity or cruelty."

The court, upon the trial of the present case, properly instructed the jury that the technical definition of murder in this commonwealth was the common-law definition of murder as recognised by the court prior to the statute of 1858, ch. 154, and that under this form of indictment the jury are by their verdict, if they find the prisoner guilty, to find also the degree of murder. The first degree embraces the cases stated above, and they constitute three distinct classes, either of which, if proved, constitutes murder in the first degree.

As to the second of these classes, although not material to the present case, it may be proper to remark that an obvious error has occurred in the words "in the commission of *an* attempt to commit any crime punishable with death or imprisonment for life," in substituting "an" for "or," and thus excluding the case of murder committed in the actual commission of a crime punishable with death, or imprisonment for life, and confining it to the case of murder committed in an attempt to commit such crime. Upon recurring to the form of a proposed law by the commissioners on the penal code, reported to the legislature in 1844, from which the statute of 1858, ch. 154 was apparently copied, this error will at once be perceived, and it has, since the trial in the present case, been corrected by the Gen. Sts., ch. 160, sec. 1.

As to the case of murder committed "with deliberately premeditated malice aforethought," the instructions given to the jury are not made the subject of any exception. The sole inquiry upon this branch of the case is of the correctness of the instructions as to what constitutes a murder "committed with extreme atrocity or cruelty." The counsel for the prisoner contended that, to constitute a murder in the first degree, by reason of its being committed with extreme atrocity or cruelty, the atrocity and cruelty must be premeditated. In the opinion of the court, this position cannot be maintained. The three different cases stated as authorizing a conviction of murder in the first degree, are so far independent provisions, that the existence of either would authorize the jury to return a verdict of murder in the first degree. The statute has made extreme atrocity or cruelty in the commission of the

murder sufficient to constitute the crime of murder in the first degree; and if this be shown it is not incumbent on the government affirmatively to show that such atrocity and cruelty were premeditated.

In the present case the instruction to the jury that "if the jury were satisfied by the evidence that the deceased, a female under eight years of age, was, by the persuasion of the prisoner, enticed from the house of Mrs. Burlin at or about six o'clock on the evening of the 5th November, 1858, and the prisoner having thus acquired the confidence of the child, and the possession of her person, at once proceeded to perpetrate upon her person the crime of rape, actually ravishing her body by force, and thereby inflicting severe wounds upon the private parts of her body, and, as a part of the same transaction, and for the purpose of concealing this crime and escaping punishment therefor, proceeded further to inflict numerous severe blows upon her head and face, and then to throw her body into the Connecticut River, and by these means caused her death, it would be competent for them to find the prisoner guilty of murder committed with extreme atrocity and cruelty, and of murder in the first degree," was, in the opinion of the court, most fully authorized, these facts showing a case of murder committed with extreme atrocity and cruelty. In this third class it is the barbarity and atrocity that attends such murder that increases the guilt of the party, and that calls for the highest degree of punishment known to our law. The mere recital of facts that make up the history of this homicide, it would seem, should silence every doubt of its being a case of most aggravated atrocity and cruelty.

It is further to be remembered that the instruction to the jury upon this point was merely the legal instruction that it would be competent for the jury to find a verdict of guilty of murder in the first degree upon proof of such facts as were stated. It left the matter wholly to the jury so to find or not to find, only ruling as to the competency of such evidence to establish the atrocity and extreme cruelty prescribed in the statute.

It is, upon the present hearing, objected that many of the facts stated as subjects for the consideration of the jury as bearing upon this point, were not stated in the indictment. We are of opinion that they need not be. Such facts may not have been the cause of death, and yet they may have

materially contributed to make the killing one of atrocity and extreme cruelty.

The counsel for the prisoner asked that the jury might be instructed to render a verdict on the three counts separately. These counts charge the offence in different forms as to the mode of perpetrating the same. 1. That the death was caused by throwing the deceased into the Connecticut River, whereby she was suffocated and drowned. 2. That the murder was committed by an assault with some weapon and instrument unknown.

3. That the murder was committed by an assault with a weapon and instrument unknown, and by throwing the deceased into the Connecticut River, by which wounds and casting into the Connecticut River she came to her death.

There being but one offence charged, though set forth in various counts, adapted to meet the evidence, the jury were properly instructed, that if they found the prisoner guilty of the murder as set forth in either of the counts, they might return a verdict of guilty, generally. Under this instruction the jury have, by a general verdict of guilty, found the prisoner guilty of murder as set forth in some one of the counts at least, for it was only upon such finding that the general verdict of guilty, under the ruling of the court, could be rendered. It is important, and perhaps material to the consideration of the present question, that each and every one of these counts is in technical form, aptly drawn, and sets forth fully all that is necessary to constitute a charge of murder, and to authorize a judgment and sentence therefor. Had a verdict been rendered in form on either of these counts, no objection could have been taken to a judgment and sentence thereon. A separate verdict on each of these counts, and assuming that verdict to have been guilty upon one of them, and not guilty upon the others, would have presented the case, as regards the judgment and sentence thereupon, precisely as it now stands. A conviction upon one is equally fatal to the prisoner, as upon all, it being shown that each count is good and sufficient in itself, and would authorize a judgment and sentence thereupon.

This practice of rendering a general verdict of guilty, without distinguishing between the particular counts in the indictment, where they charge only a single offence, and various counts, are introduced to meet more accurately the

precise circumstances of the transaction, has certainly been very general, and usually adopted in capital trials in this court.

In the well-known case of *Commonwealth* v. *Webster*, 5 Cush. 295, in which the defendant was charged with the murder of Dr. Parkman, there were four counts, charging the offence to have been perpetrated in different modes. One of the counts was of the most general character, charging the crime to have been perpetrated "in some way and manner, and by some means, instruments and weapons to the jurors unknown." The other counts varied thus: one charging a mortal wound by stabbing with a knife, another by a blow on the head with a hammer, and a third "by striking, kicking, beating, and throwing on the ground." Yet upon these a general verdict was returned. It is true that no direct motion was made, as in the present case, by the counsel for the prisoner, that the jury be directed to render a separate verdict as to each count. But from the well-known ability of the counsel in that case, it must be assumed that such a motion would have been made, if, in their opinion, the law would have sustained it. The necessity of resorting to these various and somewhat inconsistent forms of alleging the mode in which the death was caused, is well stated by the late chief justice in Webster's case; and the reason for their being introduced equally requires and justifies a general verdict upon all such as are legally formal. In reference to such counts it was there said by the court, "Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined." In the case supposed, it would be as impracticable for the jury of trials to find upon the evidence which actually caused the death, as it would be for the grand-jury who presented the indictment. The form of this indictment, and the reasons for it, are strikingly like the case above supposed.

In the case of *Commonwealth* v. *Dominic Daley and James Halligan*, for the murder of Marcus Lyon, tried in the county of Hampshire, in the year 1806, I find the indict-

ment to have been thus: The first count charged that Daley, with a pistol, gave Lyon the blow, of which he instantly died, and that Halligan was present aiding and abetting; the second count alleged that Daley gave the blow as aforesaid, and immersed the body in Chicopee River, so that Lyon died as well by reason of the immersion as the blow, and that Halligan was present aiding and abetting; the third alleged that Daley and Halligan, each with a pistol in their hands, gave the mortal wounds and bruises, of which Lyon instantly died. Those counts differed, as will be perceived, as much as those in the case at bar, but a general verdict of guilty was rendered, the prisoners sentenced thereon, and the sentence executed upon them.

We may refer to some English cases illustrative of this point. In *Rex* v. *O'Brien*, 1 Denison, C. C. 9, where in one count A. B. was indicted for the murder of J. N. by a blow of a stick, and C. D. and E. F. were charged as aiding and abetting; and in a second count it was alleged that C. D. perpetrated the murder by throwing a stone, and A. B. and E. F. were charged as being present aiding and abetting, and a general verdict was given; it was objected to, as it left it uncertain whether the stick or the stone caused the death, but the judges held the conviction good, saying "the mode of death in both counts being substantially the same."

In *Rex* v. *Downing*, 1 Denison, C. C. 62, where two were indicted for murder, A. in the first count being indicted as principal in the first degree, and B. as being present aiding and abetting, and in the second count B. was indicted as principal in the first degree, and A. as being present, aiding and abetting, and the jury found them guilty, but said they were not satisfied as to which of them actually committed the murder, (that is, whether the mode of causing the death was properly set forth in the first or in the second count,) the judges held that the jury were not bound to find the defendants guilty on one particular count, but might render a verdict of guilty on both. It is true that, in reference to the case last cited, the law makes no difference between the offence of principal in the first degree or principal in the second degree. Arch. Cr. Pl. 12. But the case is an authority that the verdict of guilty need not be confined to one count, although only one offence is intended to be charged, or offered to be proved. It seems to us in a case

like the present, where all the counts are in proper legal form, and relate to a single offence, and a conviction on any one requires the same judgment and the same sentence as a conviction on all would; that, if the jury find the prisoner guilty of murder in the form set forth in either of the counts, they may find him guilty generally.

On the part of the defendant it is denied that each of these counts is in proper legal form, and would be unobjectionable upon a motion in arrest, or upon a writ of error in case such count had been the single count upon which the jury had returned a verdict of guilty.

The count most strongly objected to is the second, where it is alleged, "of which said mortal bruises and wounds the said Augustina then and there instantly died." In the preceding part of this count, the name of the party alleged to have been killed, is written Augustine, and it is contended that this is a variance, and that the party alleged to have died of said mortal bruises and wounds, is other and different from the party described in the previous parts of the count, and upon whom the assault is alleged to have been made. That the meaning, to any other than a technical mind seeking for discrepancies, would be entirely obvious, no one can doubt. The deadly and mortal bruises are alleged to have been inflicted on "Augustine," and it is alleged "that of the said mortal bruises and wounds the said Augustina died." But upon giving to the prisoner the full benefit, as he has a right to have the full benefit, of any variance, if such exists, we are not satisfied that such variance exists. There is not a fatal variance here. The names, as written, only differ in the final letter, substituting *a* for *e*. This does not necessarily change the sound of the name. It may still be *idem sonans*. You may read them as different in sound by dividing the first into three syllables, and the other into four; or both may be pronounced alike. In this manner they are found stated in the indictment, they are legally and properly to be taken as describing the same person. In *Rex* v. *Wilson*, 1 Denison, C. C. 201, the name as set forth was John McNicole, when the true name was John McNicoll, and it was held no variance, the court saying the use of the letter *e* for *l* did not make a different name.

The same mode of describing the name of Augustina also in the third count, for the above reason, would not be fatal.

But in this case it might also be rejected as surplusage, and the count be good and sufficient.

The objection in arrest of judgment upon the ground that murder in the first degree is not technically charged in the indictment, there being no allegation of the act required by the statute to constitute that offence, is not tenable. The answer to this is that the crime charged in this indictment is murder as known and defined at the common law. That offence is here technically charged. The statute provision has only reference to the extent of the punishment, and for that purpose the jury are required to find the degree. This question is not now for the first time before the court. In connection with the other questions raised in the case of *Commonwealth* v. *Gardner*, at Plymouth, 1858, (23 Law Reporter, 470,) it was directly held by this court that this form of indictment was sufficient, the court in the opinion in that case saying, "it seems to us to have been the clear intent of the legislature that the form of an indictment for murder should remain as it has been, the legislature manifestly considering murder as one kind or grade of crime, the punishment of which may be more or less severe, according to certain aggravating circumstances which may appear on the trial." It was also held that such form of indictment in the case of murder, without distinguishing in the indictment the character of the offence, as of the first or the second degree of murder, was not inconsistent with the twelfth article of the Bill of Rights. This form of indictment has the direct authority of the legislature in the act creating the distinction between the two degrees of murder. It has the sanction of this court upon full argument, and must be held as now settled law for this commonwealth.

It was further objected that the counts in the indictment charge "the killing and murder" only argumentatively by alleging "and so did kill and murder." But this will be found to be in accordance with approved forms, and to have been properly used.

Nor does any ground exist for arresting the judgment for the misspelling the name of the town of Chicopee by adding "k" to the first syllable. It is clearly a name *idem sonans*.

As to the minor objections suggested, that of the use of the abbreviation "sd," and several interlineations in the indictment, however they might have furnished a proper ground for a motion to the discretion of the court for

quashing the indictment, had a motion to that effect been made before the party had pleaded, or perhaps before he was put on his trial; they furnish no sufficient ground for arresting judgment after a trial and verdict against the prisoner. It is unnecessary, perhaps, to add that such imperfections are objectionable and to be avoided, especially in indictments for offences of this grade.

In presenting these views upon the case upon the exceptions, we are not to be understood as calling in question the general rule, well known and practised upon, that when there are several counts in an indictment, and a general verdict is taken without objection, upon a motion in arrest or writ of error, if there be one good count, judgment may be entered upon that. Here the counsel for the defendant objected at the trial to such general verdict, and as the operation of the rule we have referred to would prevent his taking, at a later stage, the objection that some of the counts were not good, it has seemed to require us to find all the counts good to sustain this ruling.

The objection relied upon to sustaining this verdict upon the ground of variance between the name of the party alleged to have been killed and murdered, and that shown by the evidence, is wholly untenable. If the name by which the party is usually called and known be stated in the indictment, it is sufficient. The instructions were to this effect, and the jury have found no variance. Upon this point the authorities are quite uniform, and are founded in reason and good sense. In a case of larceny, in which the indictment alleged the stealing of the goods of Mary Johnson, and where the evidence was that the original name of the party was Mary Davis, but that she had been called and known by the name of Mary Johnson for the last five years, the court held that there was no misdescription, and that the indictment might be maintained. Russell and Ry. 510. In another case, where the party was indicted for stealing the goods of Richard Pratt, and it appeared that his name was Richard Jeremiah Pratt, but it was shown that he was equally well known by the name of Richard Pratt, it was held to be no case of variance, and the indictment was sustained. 6 C. & P. 408; Roscoe Ev. 78.

Upon the whole matter we find no ground to sustain any objections presented by the bill of exceptions, or by the motion in arrest of judgment, although they have been

very ably and ingeniously presented for our consideration by the counsel for the prisoner.

The result is, therefore, that the exceptions taken by the prisoner to the rulings of the court upon the trial, as well as the motion in arrest of judgment, be overruled.

Exceptions overruled.

George M. Stearns, for the prisoner.

Phillips, A. G., for the commonwealth.

COMMONWEALTH *v.* HENRY WEYMOUTH.

A judge of the superior court has power to revise and increase a sentence imposed upon a convict, during the same term of court, and before the original sentence has gone into operation, or any action has been had upon it.

HABEAS CORPUS. — It appeared by the record that the prisoner, after a plea of guilty, in the superior court, to an indictment for larceny in a building, was sentenced, on the 18th of February, 1851, by PUTNAM, J., to be punished by confinement in the house of correction for two years; and, on the same day, after the issue of the warrant by virtue of which he was ordered to be committed to the house of correction, but before the service or execution thereof, upon notice of the attorney of the commonwealth, the court ordered that the execution of the warrant be stayed until a farther hearing. On the next day the prisoner was set to the bar, and the attorney for the commonwealth moved for a revision of the sentence passed upon him; and the prisoner protested against the same. And the court, after hearing testimony concerning the prisoner's character, and farther evidence concerning the circumstances of the case, ordered that the previous sentence passed upon him be revised, and that he be punished by confinement in the state prison for three and a half years, the first two days of which were to be solitary.

C. H. Hudson and *B. F. Russell*, for the prisoner.

Foster, A. G., for the commonwealth.

BIGELOW, C. J. We are not called upon in the present case, to express any opinion concerning the wisdom or expediency of the course adopted by the court below, in revising and changing a sentence which had been formally promulgated and pronounced on a convict. The presumption is that there were sufficient reasons, addressing them-

selves to the sound judicial discretion of the court, for such action, and that it was deemed to be necessary in furtherance of justice and the due administration of the law. The single question which we have to determine is, whether, upon the record as certified to us, there is any such irregularity or illegality as to entitle the petitioner to be discharged from the imprisonment to which he is now subjected under and by virtue of the judgment and sentence of that court.

It seems to have been recognised as one of the earliest doctrines of the common law that the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered. It is said by Lord Coke, in Co. Litt. 260 a: "Yet during the term when any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct, but when that term is past, then the record is in the roll, and admitteth of no alteration, averment, or proof to the contrary." This statement of the rule of law is substantially followed by subsequent text-writers of high authority. 4 Com. Dig. Record. F. Judgt. N.; 2 Bac. Abr. 716; 2 Gabbett Cr. Law, 564. In 1 Chit. Crim. Law, 722, it is stated thus: "In case of misdemeanors, it is clear that the court may vacate the judgment before it becomes matter of record, and may mitigate or pass another, even when the latter is more severe; and the justices at sessions have the same power during the sessions, because it is regarded as only one day." That this power has been often exercised by the court in England, is manifest from cases in which it appears that judgments and sentences during the same term in which they have been entered, have been vacated, and others substituted, without doubt or question. *Rex* v. *Fitzgerald*, 1 Salk. 401; *Turner* v. *Barnaby*, 2 Ib. 567; *King* v. *Price*, 6 East. 322, 327; *King* v. *Justices of Leicestershire*, 1 M. & S. 444; *Darling* v. *Gurney*, 2 Dowl. P. C. 101. The authority thus exercised is probably founded on the practice by which the record is not finally made up until the end of the term or session of the court, when "the roll," as it is called, is signed and returned. Until then, it remains in the control of the court, and no entry therein is deemed to be final, or beyond the power of the court to amend or alter it, either for error or other sufficient cause. The practice

in this commonwealth has been substantially in accordance with the rule of the common law, as stated in the authorities above cited. It has been varied only so far as to adapt it to the different forms and modes of doing business in our courts. During the term, no record, in the strict meaning of that word, is kept of the doings of the court. Its proceedings are noted by the clerk from day to day in brief minutes upon the docket, and from these the extended record is drawn up after the final adjournment for the term. The memoranda thus made have always been subject to such alterations during the term as might be deemed by the court necessary or proper, either by correcting mistakes or by substituting a different entry or judgment from that originally made. Nor is this the extent of the power of the court over its records. Upon due proof that some error has been made in drawing up the record, amendments have been allowed after the final entry of judgment and the adjournment of the court for the term. *Tilden* v. *Johnson*, 6 Cush. 354; *Balch* v. *Shaw*, 7 Cush. 282; *Fay* v. *Wenzell*, 8 Cush. 315. In *Stickney* v. *Davis*, 17 Pick. 169, this court allowed a judgment to be vacated after the expiration of a year from its rendition, and a new one to be substituted. The power of the court to allow such amendments, and the due and proper limitation on its exercise, are there stated and accurately defined. The rule is declared to be that, if it clearly appears that no action has been had on the judgment, or the execution, if one has been issued, has been returned to the files unexecuted, and where the rights of third persons, not parties to the suit, cannot be affected, there is no good reason for refusing to vacate a judgment for sufficient cause, and substituting a new one in its place. This is certainly a safe and reasonable exercise of judicial discretion, which cannot be used to abridge or infringe upon the rights of any one; not on those of the parties to the suit, if a legal and regular judgment only is rendered; nor on third persons, because it cannot be exercised, if it operates to their prejudice or injury. The application of this doctrine to the present case is decisive against the claim of the petitioner to his discharge. It is not contended that the court has any less power or control over its records in a criminal case than in one which affects the parties *civiliter* only. Certainly there is no ground for any such distinction. The true test by which to determine whether the power can

be exerted is, to ascertain whether it will affect the legal rights of the parties. If it will not, then it is a legitimate exercise of judicial discretion, of which no one has a right to complain. The petitioner in the present case is not subjected by the amended sentence of the court to any punishment for his offence other or greater than that allowed by law. He was never taken or charged on the warrant which was issued on the sentence as originally pronounced. That sentence never went into operation, and, in effect, was the same as if it had never been passed. So long as it remained unexecuted, it was, in contemplation of law, in the breast of the court, and subject to revision and alteration. He was not injured or put in jeopardy by it any farther than he would have been by a conclusion or judgment of the court as to the extent of his punishment, which had not been announced. Until something was done to carry the sentence into execution, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he was entitled was taken away or invaded, by revoking the sentence first pronounced, and substituting in its stead the one under which he now stands charged. If it had appeared that the petitioner had been actually taken and committed under the first sentence, or if he had been thereby condemned to imprisonment in the state prison, so that the term of his sentence would be computed from the time he was first ordered to remain in the custody of the sheriff, according to st. 1859, ch. 248, we might have arrived at a different result; but on the record as it stands, we are all of opinion that the order must be —

Prisoner remanded.

Commonwealth *v.* Daniel Hackett.

In an indictment against A B for murder, by stabbing, a declaration by the deceased, made immediately after the infliction of the mortal blow, "A B has stabbed me," is admissible in evidence, as a part of the *res gestæ*, although the defendant had run away before the declaration was made.

One who has wilfully inflicted upon another a dangerous wound with a dangerous weapon, from which death ensued, is guilty of murder or manslaughter, as the evidence may prove, although, through want of due care or skill, the improper treatment of the wound by surgeons may have contributed to the death.

Indictment for the murder of Henry Gillen.

At the trial in this court, evidence was offered by the government tending to show that the defendant suddenly

approached the deceased in the night, and stabbed him in two places in the abdomen, and immediately ran away; and that the deceased died nineteen days thereafter. At the moment when the stabs were inflicted, Gillen cried out, "I'm stabbed." John Butler, a witness for the government, testified that he heard these words, and at once went to Gillen, and reached him within twenty seconds after the exclamation was made, and was the first person who got there. The attorney-general then put to the witness this question: "When you got to Gillen, what did he say, if anything?" This question was objected to, but allowed to be put, and the witness answered that the deceased said, "I'm stabbed —I'm gone—Dan Hackett has stabbed me."

The defendant contended that there was evidence to show that the wounds of the deceased were unskilfully and improperly treated by the surgeons who attended him, and requested the court to instruct the jury as follows: 1. The rule that the death must happen within a year and a day, is one of limitation only, and does not change the burden of proof, or release the government from the duty of proving affirmatively that the deceased died of the wounds alleged in the indictment. 2. It is not enough to satisfy this burden for the government to prove that without the wounds the deceased would not have died. 3. If the death was caused by the improper applications or improper acts of the surgeons in dressing the wounds, the case of the government is not made out."

The court instructed the jury substantially in conformity with the first clause of the instructions asked for, but declined to give the others, and in place thereof instructed them, substantially, that the burden of proof was upon the government to prove beyond a reasonable doubt that the deceased died of the wounds inflicted by the defendant, but that this general rule required explanation in its application to certain aspects of the present case; that a person who has inflicted a dangerous wound, with a deadly weapon, upon the person of another, cannot escape punishment by proving that the wound was aggravated by improper applications or unskilful treatment by surgeons; that if, in the present case, they were satisfied that the wounds inflicted by the defendant were improperly and unskilfully treated by the surgeons in attendance, and that such treatment hastened or contributed to the death of the deceased, the defendant

was not for this reason entitled to an acquittal, but that the rule of law was, that, if they were satisfied beyond a reasonable doubt that the defendant inflicted on the deceased dangerous wounds with a deadly weapon, and that these wounds were unskilfully treated, so that gangrene and fever ensued, and the deceased died from the wounds combined with the maltreatment, the defendant was guilty of murder or manslaughter, according as the evidence proved the one or the other; that if they were satisfied not only that death would not have ensued but for the wounds, but also that the wounds were when inflicted dangerous, the defendant would be responsible, although improper and unskilful treatment might have contributed to the death; that the law does not permit a person who has used a deadly weapon, and with it inflicted a dangerous wound upon another, to attempt to apportion his own wrongful and wicked act, and divide the responsibility of it, by speculating upon the question of the extent to which unskilful treatment by a surgeon has contributed to the death of the person injured; but if they were in doubt whether the wounds were dangerous, or caused or contributed to the death, or whether the deceased might not have died from the unskilful treatment alone, then the defendant would be entitled to an acquittal.

The defendant was found guilty of manslaughter, and alleged exceptions.

B. F. Butler, for defendant.

Foster, A. G., for the commonwealth.

BIGELOW, C. J.—The court have given to this case the most careful and deliberate consideration, not only on account of the very grave nature of the charge of which the defendant has been found guilty, but also because the exceptions taken at the trial have been urged by the learned counsel for the prisoner with great earnestness and apparent confidence.

The objection to the admission in evidence of the declarations of the deceased, made immediately after the infliction of the alleged mortal blows, is put upon the ground that it was a mere narration of a past event, uttered in the absence of the defendant, and therefore in its nature essentially hearsay testimony. If we regarded only the form of words in which the declaration was made, this objection would be well founded. The language used by the

deceased apparently referred to an event which had passed. But this is by no means a decisive consideration. The argument would have been equally strong in case the words had been uttered as soon as the knife had been withdrawn from the body of the deceased, if it appeared that from any cause, the defendant could not then have heard them. But it is necessary, in order to determine the question of the competency of this evidence, to regard not only the language used, but also the circumstances under which it was uttered. If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement, contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*. The true test of the competency of the evidence is not, as was urged by the counsel for the defendant, that it was made after the act was done, and in the absence of the defendant. These are important circumstances, entitled to great weight, and, if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact, which was the subject of inquiry before the jury. The case of *Commonwealth* v. *McPike*, 3 Cush. 184, is an authority which goes much farther to sanction the competency of evidence of this nature than is necessary in order to sustain the ruling under which the declarations of the deceased were ad-

mitted in the present case. It is very true that the rule which renders *res gestæ* competent evidence has been often loosely administered by courts of justice, so as to admit evidence of a dangerous or doubtful character, and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony. *Lund* v. *Tyngsborough*, 9 Cush. 36. But to exclude it in the present case would be practically to say, that no declaration or statement, however near to the principal fact, or however important and material, as giving to it color and significance, could ever be admitted in proof. We are disposed to apply the rule strictly, and to exclude everything which does not clearly come within the just and proper limitations. But we cannot see that they were exceeded in the admission of the evidence, to which exception was taken at the trial of the case at bar.

We have looked with care into the authorities which bear on the correctness of the instructions given to the jury, relating to the unskilful or improper treatment of the wounds alleged to have been inflicted by the prisoner upon the body of the deceased. We find them to be clear and uniform from the earliest to the latest decisions. In one of the first reported cases it is said, that "though a wound may be cured, yet if a party dieth thereof," it is murder. 1 Keb. 17. The same principle is stated in 3 Inst. 47, thus: "If a man give another a stroke, which, it may be, is not in itself so mortal that, with good care, it might be cured, yet if he die of this wound within a year and a day, it is homicide or murder, as the case is, and so it has been always ruled." In 1 Hale, P. C. 428, the doctrine is thus stated: "If a man receives a wound which is not in itself mortal, but either from want of helpful applications, or neglect thereof, it turns to gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound, though it were not the immediate cause of death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, *causa causati*." In *Rew's* case, as stated 1 East. P. C. ch. 5, § 113, it was determined that though the stroke was not so mortal in itself but that, with good care and under favorable circumstances, the party might have recovered, yet if it were

such from whence danger might ensue, and the party neglected it or applied inefficacious medicines whereby the wound, which at first was not mortal, turned to gangrene or produced a fever whereof he died, the party striking shall answer for it, being the mediate cause of death. *Rex* v. *Rew*, J. Kel. 26. So in a more recent case, the jury were instructed that if the defendant wilfully, and without justifiable cause, inflicted a wound which was ultimately the cause of death, it makes no difference whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment. The real question is, Was the wound the cause of death. *Reg.* v. *Holland*, 2 Moo. and Ry. 351. From these and other authorities, the well-established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russ. on Cr. 624; Ros. Cr. Ev. 703, 706; 3 Gr. Ev. § 129; *Commonwealth* v. *Green*, 1 Ashm. 289; *Reg.* v. *Haynes*, 2 Car. & Kir. 368; *State* v. *Baker*, 1 Jones (N. C.) 267; *Commonwealth* v. *McPike*, 3 Cush. 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be held to contemplate and be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such a manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskilful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty

party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and to take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy, in many cases of homicide, to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crimes might escape conviction and punishment.

The instructions to the jury at the trial of this case were in strict conformity with the rule of law as it has always been understood and administered. Indeed, the learned counsel does not attempt to show that it has ever been held otherwise. His argument on the point is confined to the signification which he attributes to the word maltreatment. This he assumes to be either wilful ill treatment, involving bad faith, of the wound of the deceased, or such gross carelessness in its management by the surgeons as would amount to criminality. But such is not its true meaning. That treatment may result either from ignorance, neglect, or wilfulness. It is synonomous with bad treatment, and does not imply, necessarily, that the conduct of the surgeons in their treatment of the wounds of the deceased was either wilfully or grossly careless. Nor was it used in any such narrow and restricted sense in the instructions given to the jury. On the contrary, in the connection in which it stands it signifies only improper or unskilful treatment, and was intended to apply to the evidence as it was developed at the trial, and to meet the specific prayer for instructions on this point, which was submitted on behalf of the prisoner. There is nothing in the exceptions which shows that there was any evidence of gross carelessness or wilful mismanagement on the part of the surgeon; nor was any such suggestion made at the trial. The statement in the exceptions is that "the defendant contended that there was evidence to show that the wounds of the deceased were unskilfully and improperly treated by the surgeons who attended him," and the instructions asked for by the learned counsel refer only to improper applications and improper acts of the surgeons, and contain no intimation of

any defence founded on alleged bad faith or criminal neglect in the treatment of the wounds inflicted by the prisoner on the body of the deceased. The distinction now suggested between maltreatment occasioned by such causes and that arising from want of due care and skill (if well founded, on which point we express no opinion), was not raised at the trial, and cannot be the foundation for setting aside the verdict.

Exceptions overruled.

RECENT ENGLISH CASES.

Queen's Bench. Nov. 20, 1860.

MYERS *v.* SARL.

Evidence — Custom — Written instrument.

A contract contained a clause in which it was stipulated that "a weekly account of work done" should be delivered. A weekly account was delivered, but only of a portion of the work done.

Held, that parol evidence was admissible to show that, in the trade to which the contract had reference, the term "weekly account of work done" was applicable to work only of a particular kind.

Where in a particular class of dealings words have acquired a peculiar meaning, well established, parties contracting with reference to that class of dealings who use those words must be taken to have used them in the acquired and not in the ordinary and popular meaning.

Where a clause stipulated that for all extra work written directions should be given, under the hand of the architect, — *Held*, that a sketch made by the architect, and not signed by him, was not such a direction as complied with the contract.

This was a special case, stated by an arbitrator for the opinion of the court; the material facts of which were as follows. The plaintiff in the action was a builder, and by deed he had agreed to build a house for the defendant for a certain sum. The deed contained the following clause: "And in case it shall be deemed necessary for the architect to make any alterations or additions in or to, or deductions from the said works, then six days further time for every £75 of such extra work shall be allowed to the said George Myers (the plaintiff) for doing the same. But no alterations or additions shall be admitted unless directed by the architect in writing under his hand; and a weekly account of the work done thereunder shall be delivered to the said

architect, or the clerk of the works, on every Monday next ensuing the performance of such work, and the delivery of such account shall be a condition precedent to the right of the said George Myers, his executors or administrators, to recover payment for any such addition or alteration." It was contended before the arbitrator that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand, pursuant to the clause in the contract above stated, and also on the ground that no sufficient weekly accounts of such work were delivered by the plaintiff within the meaning of that clause. With respect to the latter objection, evidence was given that certain accounts of the extra work were delivered by the plaintiff, as and for weekly accounts within the meaning of the contract;[1] and it was contended that the term "weekly account" as used in the contract was a term of art, well known in the building-trade and to all builders and architects, and that parol testimony was admissible to prove its meaning. The admissibility of such evidence was objected to by the defendants; but the objection was overruled by the arbitrator, who also held that the weekly accounts delivered by the plaintiff were shown by such evidence to be sufficient weekly accounts within the meaning of the contract, and he included the value of such extra work in his award accordingly. As to the first objection, it was proved that for a part of the extra work the only directions by the architect were certain sketches indicating the manner in which such extra work was to be done, but not specifying the materials to be used, or containing any absolute order or direction for the execution of such work. These sketches were all prepared by the architect and his clerks, but were not signed by any one. These sketches were held by the arbitrator not to be sufficient directions in writing within the meaning of the contract; and the value of this part of the extra work was excluded from the award accordingly.

The questions for the opinion of the court were: 1st. Was the arbitrator right in admitting parol evidence to show the meaning of the term "weekly account." 2d.

[1] It was stated in the course of the argument that the weekly account, as delivered, only included such portion of the extra work as was not capable of being measured after the completion of the works.

Whether the sketches were sufficient directions in writing under the hand of the architect, within the meaning of the contract. As the court answered these questions in the affirmative or negative, the award was to be altered accordingly.

Bovill, Q. C., (*T. Chitty*, with him,) for the plaintiff, was stopped by the court.

Lush, Q. C., (*Beesley* with him,) for the defendant, contended that the parol evidence was not admissible in this case. *Hutton* v. *Warren*, 1 M. & W. 475; *Grant* v. *Maddox*, 15 M. & W. 737; 1 Park on Insurance, p. 24; *Charlton* v. *Gibson*, 1 C. & K. 541, were referred to. The court did not think it necessary to hear any argument on the second question asked.

COCKBURN, C. J.—I think that in this case parol evidence was properly received. In every case it is the duty of the court to give effect, if possible, to the intention of the parties. And though parol evidence is not admissible to explain what that intention is, if terms are used which can have no other than one signification, yet if words are used which, besides their ordinary signification, have another and a technical signification well established by custom, then parol evidence is admissible to show what that is; and, if the parties have drawn up the contract in question with reference to that particular trade or class of dealings in which the words are used in their extraordinary or technical sense, they will be taken to have used those words in that and not in their ordinary sense. The point is well explained in Starkie on Evidence, 1st ed. vol. 3, p. 1033, where that author says, "Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according

to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." That passage was approved of by Lord Wensleydale, when, sitting as a judge of this court, he quoted it in the case of *Smith* v. *Wilson*, 3 B. and Ad. 728. The parties to this contract have used the term "weekly accounts," and the parol evidence given shows that these words have a peculiar meaning in the building-trade. It is contended that because the words, "a weekly account of the work done," are perfectly general, they must be conclusively taken to mean "a weekly account of all the work done," and that parol evidence is not admissible to attach any other meaning to them; and the judgment of Lord Lyndhurst in *Blackett* v. *The Royal Exchange Insurance Company*, 2 Cr. & J. 244, is relied on for this proposition. It was there decided that in an action on a policy in the usual form on ship, boats, etc., evidence of usage that the underwriters never paid for the loss of boats slung on the quarter was inadmissible. We are no doubt bound by that decision, but we are not disposed to carry it any farther. It goes to the extremest verge of the rule which excludes parol evidence in these cases. That case is not so absolute an authority in favor of the defendant, as to bind us on the present occasion. There was in this case distinct evidence that in the building-trade, when speaking of extra work, the phrase "a weekly account of work done" did not extend to all the work done, but to a portion only. The cases quoted in Park on Insurance, p. 24, to which I referred in the course of the argument, appear to me applicable to this case. Those cases have been quoted in various decisions and text-books down to the present time, and their authority has never been doubted. In these it was held that a policy of insurance on goods generally did not include goods stowed on deck. Yet there the terms used in the contract are perfectly general, but they were held to have received by usage, a limited construction. So in this case, though it is true that the parties stipulate in general terms for a weekly account of the work done, yet those terms are shown by the evidence to have received by usage in this particular trade a limited construction, and I think that evidence was properly admitted. As to the other questions, although I think the objection a very unhandsome one, we are bound to give our judgment for the defendant.

HILL, J.—I am entirely of the same opinion. It is contended that the words used in this contract must be taken according to their plain and ordinary meaning to include all the extra work done. The usage relied on was that the weekly accounts should include only such extra work as was incapable of being measured after the completion of the building. The question is, whether evidence of that usage was admissible? I take the rule to be this: That words used in a contract, having reference to any trade or class of dealings whatsoever, are to be taken in the plain, ordinary, and popular meaning which those words bear in the common transactions of life. But if the words have acquired in the particular trade or class of dealings with reference to which they are used a peculiar meaning, different from the ordinary and popular meaning, then the parties using those words must be taken to have used them in their peculiar and acquired meaning; and evidence is admissible to show what that meaning is. The question then is reduced to this; whether the words which it is sought to explain by parol evidence have, with reference to the subject-matter of the contract which it is sought to explain, acquired this peculiar meaning. Here this was clearly shown to be the case, and the evidence was, therefore, properly received.

BLACKBURN, J.—I am of the same opinion. If, as my brother Hill says, the words have acquired a peculiar meaning, *prima facie*, parties contracting with reference to the class of dealings in which that sense has been acquired must be taken to have used them in that peculiar sense. As was remarked by Lord Campbell, in giving judgment in the case of *Humfrey* v. *Dale*, 7 E. and B. 266, 274; 5 W. R. 466, "in a certain sense, every material incident which is added to a written contract, varies it, makes it different from what it appeared to be, and so far is inconsistent with it." If it was laid down that parol evidence was not to be admitted in any case where the effect of it would be to vary the written contrrct, the consequence would be to exclude the parol evidence in all cases. The true rule appears to me to be laid down in 1 Smith's Leading Cases, p. 397, where it is said, "evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent;" but that such evidence

is "only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument." The consequence is, that in every case the question really turns upon the construction of the instrument itself, so that each decision must, to a very considerable extent, stand alone. All, however, embrace this general principle, that where the parties have expressly or tacitly excluded the peculiar meaning which it is sought to impose upon the words, then they must be taken in their ordinary sense; but, if that sense is not excluded, then it must be presumed that the words were used in their acquired sense.

Judgment for the plaintiff upon the first question; for the defendant, upon the second.

Court of Exchequer.

DAVIS *v.* MARSHALL.

Dismissal of clerk — Length of notice — Damages.

Periodical payments are no criterion of the notice a person in the position of a clerk is entitled to. If the hiring be at a yearly salary, and he be dismissed without notice, he can recover for the remainder of the year.

This was an action for dismissal without notice, tried at the last Monmouth Assizes, before Wilde, B. Plaintiff was the manager of a shop of the defendant, under an agreement by which he was to receive a salary of £30 a year, payable monthly, commission on his sales two and one half per cent., and house-rent, which altogether made his salary equal to about £80 a year. The hiring took place in April, and the plaintiff was dismissed without notice in the August following. He now sued defendant for wages for the remainder of the year. The jury found a verdict for £46 10s.

Piggott, Sergt., now moved for rule to show cause why the verdict should not be set aside, on the ground that the damages were excessive, or why the damages should not be reduced if the verdict was allowed to stand. He contended that as the plaintiff received his salary monthly, he was entitled to a month's notice only, and therefore, to a month's salary.

The court was of opinion that there should be no rule. The monthly payments did not affect the question of notice; the plaintiff was in the position of a clerk, and

periodical payments were necessary to that class of persons. The plaintiff was entitled to his salary and allowances from the time he was dismissed till the termination of the year.

Rule refused.

Ex parte Barford.

Habeas corpus—Parent and child—Custody of a female child under sixteen—Age of discretion.

A female child under the age of sixteen years has not attained the age of discretion as to the custody in which she should be; and this court will, upon *habeas corpus*, order her to be delivered up to her father.

This was a return to a writ of *habeas corpus*, directed to one Rachel Hopkins, ordering her to bring up the body of Charlotte Barford, a female under sixteen years of age, in order that she might be delivered over to the custody of her father. By the affidavits in support of the application it appeared that the said Charlotte Barford was fifteen years of age, and that she had of her own accord left her father's house, and had been for some time with the said Rachel Hopkins, who had refused upon the application of her father to deliver her up. The said Charlotte Barford was examined by the court, and was, without any apparent cause, unwilling to return to her father. There was no affidavit that the father was unfit to have the custody of his daughter on the ground of immorality or cruelty.

Sleigh, in support of the application, cited 5 P. & M. c 8, a repealed statute, but re-enacted in the 9 Geo. 4, c. 31; *Reg.* v. *Greenhill*, 4 Ad. & E. 624; Bacon's Abr. Guardian; *In re Alicia Race*, 26 L. J. Q. B. 167; 5 W. R. 222 (Blackburn, J., referred to Radcliff's case, 3 Coke, 399).

Digby Seymour, *contra*.

Cockburn, C. J. I am of opinion that the father is entitled to the custody of this child. No case whatever has been made out on the part of those who resist his application, showing that the father is not a fit and proper person to have the custody of his daughter, either on the grounds of immorality or cruelty. The question is, therefore, simply a legal question, namely, whether a father is entitled to the custody of his daughter, she being under the age of sixteen years, and being desirous of withdrawing herself from his control. It is a sad fact in this par-

ticular instance that this young person, influenced, no doubt, by evil counsels, is desirous of leaving her father's roof, and of casting herself on those who are likely to mislead her. If we can save her from the consequences of her own folly, we shall rejoice to do so. The cases show that although the father is entitled to the custody of a child up to the age of twenty-one, yet that this court will not interfere summarily by *habeas corpus* to take a child out of the custody in which it may be, if the child have arrived at an age to exercise a discretion in the matter. The question therefore is, what is that age? I wholly repudiate the doctrine that mere mental precocity is any test. That very precocity may lead a young person to choose to be with those who will lead her wrong. We must lay down some general rule as to the age when a minor is free to choose in whose custody she will be. The legislature has thrown some light on the subject in the statute 5 P. & M. c. 8. The age of sixteen has been pointed out as the age under which the consent of a female shall not justify her withdrawal from her father's roof. I therefore think that the age of sixteen is the age under which a minor is unfit to choose for herself in whose custody she will be. I may add, we have come to this conclusion after great and deliberate consideration, and after consulting the learned judges of both the other courts.

Hill and Blackburn, JJ., *concurred.*

Order for the delivery up of the child to her father.

Gee and Another *v.* Lancashire and Yorkshire Railway Company.

Contract — Measure of damages.

In an action against a railway company for delay in carrying and delivering goods where there was no special contract, the judge directed the jury to find a certain sum for the wages of the plaintiff's servants, who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiffs should recover by the loss of profits from the same cause.

Held, to be a misdirection, on the authority of *Hadley* v. *Bazendale*, 9 Ex. 341; 2 W. R. 302.

This was a special case on appeal by the defendants from the direction of the county court judge, at Oldham, when a verdict was found for the plaintiff, under the direction of the judge. The particulars attached to the plaint stated

that the defendants, as common carriers, agreed to carry upon their railway and deliver to the plaintiffs fifteen bales of cotton, yet they broke their agreement by not carrying and delivering them within a reasonable time; but on the contrary they refused to carry and deliver the same for the space of seven days, whereby the plaintiffs were injured in their business as cotton spinners, and prevented from working their mill and machinery during each of the said days, and incurred great expenses in compensating their workmen for loss of time, and whereby the plaintiffs lost also great profit, which but for the breach by the defendants would have accrued to them. The plaintiffs rented a mill at Bottom o' th' Moor, in addition to one they already worked. At the beginning of the week commencing on the 22d of January last, the new mill being ready for working, the plaintiffs had engaged a number of hands to commence work. On the 24th, one of the plaintiffs went to Liverpool, and purchased some cotton for the new mill, to be carried by the defendants to Oldham. Ten bales, part of the cotton purchased, were on Thursday, the 26th of January, delivered to the plaintiffs, at their station at Liverpool, to be carried by them to Oldham, and delivered at the plaintiffs' mill there. It was proved in evidence that cotton purchased by the plaintiffs in Liverpool, to be worked in their old mill, had on all former occasions been delivered to the company at their Liverpool station, on the afternoon of one day, and received by the plaintiffs at their mill, at Oldham, early on the following morning. In the present instance, the cotton was not delivered until the 30th of January; and in consequence, as the plaintiffs alleged, of this delay, they were unable to work their new mill. The plaintiffs claimed for wages paid to their work-people £7; for a proportion of the rent of their mill for seven days at £410 per annum, £3 10s.; for interest on the capital of £8,000, invested in their business, £2 10s.; for the loss of profits that would have accrued, £7 10s.

The learned judge told the jury that it was too nice to seek as damages the interest on capital, and the proportion of rent, and they were not to consider these items in considering the damages to which the plaintiffs were entitled; but, in his opinion, the plaintiff had a right to charge as legal damage such loss as naturally arose from the stoppage of the mill; that the question they would have to decide

was, what had been the actual loss, and actual detriment that the plaintiffs had suffered by the non-arrival of the cotton at the proper time. The plaintiffs were entitled to the sum of £7, which they had paid their servants as wages; the rent and interest were matters too remote for a calculation of damage; but the profits the plaintiffs would have made was a fair subject of calculation. No doubt the plaintiff had estimated the loss at too large a sum; the jury would therefore give such damages over the £7, the amount of wages, — such amount, in fact, as in their opinion would be the actual loss and detriment occasioned to the plaintiff by the non-arrival of the cotton in question.

Gray. — The judge was wrong in directing the jury as to the specific sum for wages, and leaving it to them to name the reasonable amount for profits. *Le Peintur* v. *South Eastern Railway Company*, 2 L. T. N. S. 170; *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179. There was no special contract.

Dr. Wheeler, for respondents. — This case is within the rule in *Hadley* v. *Baxendale*.

Pollock, C. B. — This is an appeal from the county court of Oldham, and is a motion for a new trial on the ground of misdirection, and that the law was improperly laid down by the learned judge of that court, on two grounds: first, he told the jury that the plaintiffs were entitled to receive the money they had paid their servants; he therefore gave them £7 as wages, and as a positive item; and, secondly, as to the actual loss sustained by the non-arrival of the cotton, he left it to the jury to name the amount the plaintiffs should recover on that account. It was not merely the non-arrival of the cotton which prevented the plaintiff's mill from commencing work; but it was the non-arrival of the cotton, coupled with the fact that the plaintiffs had no stock of cotton on hand to continue the work of their mill. If it had been shown that it was the custom of mill owners not to keep a stock of cotton on hand, the direction would have been good. Here there was no special contract to deliver immediately. Railway companies are bound to carry goods at a certain rate within a reasonable time; but if they are required to carry and deliver them in very short space of time, and to be held responsible for non-arrival within that time, I should think they would say, they would not be responsible, unless a sum exceeding the ordi-

nary tariff was paid. In *Hadley* v. *Baxendale*, Anderson, B., in delivering the judgment of the court, said, "We think the proper rule for estimating the damages in such a case as this, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered as arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable results of the breach of it." Here, the damage cannot be said to arise fairly and reasonably from the non-arrival of the cotton; but from the non-arrival of the cotton together with the fact that the plaintiffs had no store of cotton on hand to continue the work of their mill; and having no such store, did not give the defendants proper notice that their mill would be at a standstill for want of such goods. I am therefore of opinion that the rule must be made absolute for the appellants, and a new trial granted.

BRAMWELL, B. — I think there was a misdirection in this case. The rule in *Hadley* v. *Baxendale* says the defendant is not liable, except for such damages as may reasonably be expected. Here, it was not the defendant's fault alone that that the mill was stopped. There was no special contract. I think during the performance of the contract, notice of the consequence of breaking it may be given; here, proper notice was not given. The judge should not have directed the jury to find the two items of wages and profits. Having done so, I think he was wrong, and there was a misdirection, and that our judgment should be for the appellants.

CHANNELL, B. — I am of the same opinion. The appellants are entitled to judgment. It cannot be said that the damage flowed from the breach of contract alone.

WILDE, B. — The summing up of the learned judge is not capable of two interpretations; he says, the plaintiff is entitled to legal damages for the stopping of the mill; he gives them £7 for their servants' wages, and, as to the profit loss, he says, the plaintiff has probably put it too high, and it is for them, the jury, to name the amount. Was he correct, according to the rule in *Hadley* v. *Baxendale?* I think not; for the damage sustained was not the natural consequence of the non-arrival of the cotton, but, as my lord

says, of that and the plaintiff keeping no stock in hand. I think it is not the province of the judge to tell the jury what is the legal measure of damages. Railway damages are a most difficult subject to deal with, and the rule in *Hadley* v. *Baxendale* does not meet all cases. I think there is no legal measure for the damages in these cases. In this case the rule in *Hadley* v. *Baxendale* does not support the ruling of the learned judge. I therefore think it was bad, and am of opinion that our judgment should be for the appellants.

Judgment for appellants.

NOTICE OF NEW PUBLICATION.

REPORTS OF CASES, ARGUED AND DETERMINED IN THE COURT OF CRIMINAL APPEAL, from Michaelmas Term, 1848, to Michaelmas Term, 1851. By LEOFRIC TEMPLE and GEORGE MEW. London: S. Sweet, 1852. 8vo. pp. 666.

The cases published in this volume are also published in Denison and in Cox. If it is asked why it is necessary to read the same cases in different reports, the answer of Mr. BARON BRAMWELL, when examined before the commissioners appointed to inquire into the arrangements for transacting judicial business, is satisfactory. To the question, "Do you read all the multifarious reports, namely, the Jurist, the Law Journal, the Justice of the Peace, and the Law Times?" The learned judge answered, "No; I read what I suppose you may call the orthodox reports of the three common-law courts, namely, Ellis & Blackburn, the Common Bench Reports, and Hurlstone & Norman. I read the Law Journal Reports, equity and common law, and I read the Jurist Reports. . . . It may be asked, why does one read the same thing in duplicate? My answer to that is, that if I distinctly comprehend the case when I read it, I do not trouble myself to read it again; but it very frequently happens that you find varieties of expression in the judgments, where they have not been considered and written, of such a character that it is quite desirable that you should read both reports. You may find that one reporter is struck by one remark, which he puts down, and while writing it, not being an accomplished short-hand writer, something escapes his attention, which the other puts down." See The Jurist, Vol. III. (N. S.) p. 331.

In *Regina* v. *Waters*, p. 57, it was decided, that after verdict, in a *criminal* case, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment. This is a very important decision, and contrary to the general opinion of the profession that there can be no aider by verdict in a criminal case. In *Commonwealth* v. *Child*, 13 Pick. 200, SHAW, C. J. said: "It is a well-settled rule of law, that the statute respecting amendments does not extend to indictments, that a defective indictment cannot be aided by a verdict, and that an indictment, bad on demurrer, must be held insufficient upon a motion in arrest of judgment." In the absence of any decided cases, it is difficult to perceive on what principles the proposition is founded that there can be no aider by verdict in a criminal case, or why there is any such

distinction between civil and criminal pleading. LORD DENMAN, C. J., in delivering judgment in the House of Lords, in O'Connell's case, remarked, that a large portion of the *legal opinion* which has passed current for law falls within the description of "law taken for granted." It seems that the proposition in question is the mere statement and restatement of a doctrine which cannot be traced to any competent authority.

In *Regina* v. *Williams*, p. 235, a warrant issued by justices of the peace was held to be bad. MAULE, J. observed: "They follow the form in Burn's Justice; but it is not the first form in that work which has been objected to, and decided to be wrong."

In *Regina* v. *Webb*, p. 28, it was said at the bar that "Archbold's forms have not received any public approbation, nor are they to be considered as law." POLLOCK, C. B., in answer to this observation, observed, "Generally speaking, Mr. Archbold's publications are remarkable for their accuracy, and I know no person who has contributed more to the profession, by his great diligence and learning." But in *Regina* v. *Ion*, 2 Denison, 488, when the eleventh edition of Archbold's Criminal Pleading by Welsby was cited, the same learned judge said that Mr. Welsby was "not yet an *authority*."

If a larceny of particular pieces of coin, as sovereigns, half-sovereigns, crowns, &c., is charged, the indictment is not supported by proof of the stealing of a sum of money, which must have consisted of some or other of the coins mentioned in the indictment, without proof of the stealing of some one or more of the specific coins named. *Regina* v. *Bond*, 242. ERLE, J., dissenting, said: "It seems to me, that if this indictment is not good, no good indictment could be drawn to meet the case, although the party is guilty; and if no indictment could be framed to bring the felon to justice, the law becomes an absurdity. If the party is found guilty and allowed to escape, it appears to me, that it is the rules of pleading alone which allow a felon to go unpunished; and, as the rules of pleading are subsidiary to the performance of justice, I think the party ought not to be acquitted." ALDERSON, B., in delivering the judgment of the majority of the court, said: "If the prisoner had been indicted upon each coin separately the jury must have acquitted, and the majority of the court are therefore of opinion, the verdict must be for the prisoner, because the jury cannot say that he stole a sovereign or a half-sovereign, or any one of the coins mentioned. It is unfortunate that the law should be so. Perhaps it might be proper that the legislature should make it sufficient to state that the party had stolen a sum of money; but, until that is done, we must decide as in the present instance." In accordance with this suggestion of the court, the legislature enacted in larceny of money, as they had already done in embezzlement, that a general statement of a larceny of moneys, numbered to a specified amount, shall be sufficient. Stat. 14 and 15 Vict. c. 100, § 18.

In order to constitute a larceny, the act must be of such a character that an action of trespass would lie for it. *Regina* v. *Stear*, p. 11. WILLIAMS, J. said the distinction is, whether trespass *de bonis asportatis* or trover would be the proper form of action. If the former, an indictment might be sustained; but not so if the latter.

The style of reporting in this volume is very good. The statement of the case is clean and accurate. The arguments on both sides are exceedingly well presented. To several of the cases the reporters have appended valuable notes. Some of the cases being based upon statutes of local application, must have but local value. But even in the construction of a local statute the decision of a principle is often connected which renders the case of value generally.

H.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencem't of Proceedings	Name of Judge.
		1861.	Returned by
Adams, William, (1)	West Cambridge,	May 24,	Isaac Ames.
Armstrong, William,	Boston,	" 15,	"
Baldwin, Daniel H. (2)	Hinsdale,	" 4,	James T. Robinson.
Barker, George M. (3)	Boston,	" 27,	Isaac Ames.
Bartlett, Bradbury E.	Chelsea,	" 22,	"
Beaman, Alexander,	Chelsea,	" 23,	"
Belford, Sarah,	West Roxbury,	" 16,	George White.
Betterly, Albert, (1)	Boston,	" 24,	Isaac Ames.
Bingham, Alonzo A.	Gt. Barrington,	" 8,	James T. Robinson.
Blake, James G. (4)	Cambridge,	" 28,	Isaac Ames.
Bowers, Charles,	Somerville,	" 6,	Wm. A. Richardson.
Brett, Wm. F. (5)	No. Bridgewater,	" 21,	Isaac Ames.
Brett, Zenas F. (5)	Brookline,	" 21,	"
Bristol, George V.	Pittsfield,	June 10,	James T. Robinson.
Brown, Charles S.	Newton,	May 21,	Wm. A. Richardson.
Brown, Wm. L.	Newton,	" 29,	"
Carlton, John,	Boston,	" 15,	Isaac Ames.
Carr, Arthur E.	Stoneham,	" 25,	Wm. A. Richardson.
Carter, N. J.	North Adams,	April 20,	James T. Robinson.
Chase, Wm. S.	Haverhill,	May 16,	George F. Choate.
Cleland, Samuel,	Chelsea,	" 11,	Isaac Ames.
Currier, John F. (6)	Boston,	" 31,	"
Currier, Caleb S.	South Danvers,	" 25,	George F. Choate.
Curtis, Jesse,	Stoneham,	" 25,	Wm. A. Richardson.
Davenport, Charles W. (4)	Cambridge,	" 28,	Isaac Ames.
Davis, Alvin F. (2)	Hinsdale,	" 4,	James T. Robinson.
Dean, Charles R. (7) } Dean, S. M. (7) }	Dalton,	April 26,	"
Demsey, Alden A.	Danvers,	May 4,	George F. Choate.
Dodd, Benjamin,	Boston,	" 8,	Isaac Ames.
Downing, Samuel L.	Somerville,	" 16,	Wm. A. Richardson.
Fay, Julius R.	Boston,	" 28,	Isaac Ames.
Flanders, Daniel D. (8)	Haverhill,	" 16,	George F. Choate.
Flanders, Leonard H. (9)	Haverhill,	" 6,	"
Fobes, Dwelly,	W. Bridgewater,	" 23,	Wm. H. Wood.
Forsaith, Hilas,	Roxbury,	" 31,	George White.
Foster, Albert H.	Worcester,	" 2,	Henry Chapin.
Fowle, George,	Boston,	" 16,	Isaac Ames.
Freemantle, George, (10)	West Roxbury,	" 9,	"
Friend, Richard,	Cambridge,	" 22,	Wm. A. Richardson.
Fuller, James G.	Charlestown,	" 19,	"
Gilbert, John G.	Milford,	" 10,	Henry Chapin.
Graves, Samuel, (10)	West Roxbury,	" 9,	Isaac Ames.
Hammond, Artemas,	Boston,	" 7,	"
Hanson, John L.	Boston,	" 27,	"
Hathaway, James H. (12)	New Bedford,	March 28,	Edmund H. Bennett.
Hawkins, Lorenzo D.	Stoneham,	May 8,	Wm. A. Richardson.
Heustis, William, (13)	Leominster,	" 17,	Henry Chapin.
Hewes, William H. (14)	Haverhill,	" 30,	George F. Choate.
How, Calvin, (8)	Haverhill,	" 15,	"
Howard, Francis,	Boston,	" 10,	Isaac Ames.
Howe, Elias,	Cambridge,	" 27,	Wm. A. Richardson.
Howe, James,	Boston,	" 23,	Isaac Ames.
Howe, Nahum B.	Gardner,	" 17,	Henry Chapin.
Ide, Edwin R.	Salem,	" 6,	George F. Choate.
Jackson, Henry C. (5)	Boston,	" 21,	Isaac Ames.
Jones, Jarvis,	Gt. Barrington,	" 8,	James T. Robinson.
Josselyn, John H. (15)	Boston,	" 9,	Isaac Ames.
Josselyn, John H., Jr. (15)	Boston,	" 9,	"
Joy, Samuel,	Danvers,	" 27,	George F. Choate.
Kimball, Alfred, (16)	Haverhill,	" 29,	"
Kimball, Charles A. (9)	Haverhill,	" 4,	"
Kimball, Warren, (16)	Haverhill,	" 29,	"
Knight, Samuel D.	Cambridge,	" 16,	Wm. A. Richardson.
Knowles, Simon A.	Grafton,	" 14,	Henry Chapin.
Landers, Edwin M.	Pittsfield,	June 4,	James T. Robinson.
Larty, William M.	Boston,	May 31,	Isaac Ames.
Lassell, Charles,	Acton,	" 11,	Wm. A. Richardson.
Lawton, Charles,	Taunton,	" 27,	Edmund H. Bennett.
Learned, Walter N. (17)	Gardner,	" 22,	Henry Chapin.
Learned, William H. (17)	Gardner,	" 25,	Henry Chapin.
Leavitt, William P.	Lynn,	" 24,	George F. Choate.

INSOLVENTS IN MASSACHUSETTS — *(continued)*.

Name of Insolvent.	Residence.	Commencem't of Proceedings	Name of Judge.
			Returned by
Libbey, Horace,	Boston,	May 2,	Isaac Ames.
Marble, James S. (3)	Malden,	" 27,	"
Marshall, David,	Boston,	" 16,	"
Mayhew, Matthew A.	Boston,	" 20,	"
Maynard, Freeman F.	Haverhill,	" 27,	George F. Choate.
McClennen, John H.	Boston,	" 7,	Isaac Ames.
McCoard, Thomas,	Salem,	" 21,	George F. Choate.
Meahen, John,	Chelsea,	" 14,	Isaac Ames.
Meserve, John A.	Boston,	" 11,	"
Miller, Luke B.	Gt. Barrington,	March 13,	James T. Robinson.
Moore, Oliver J.	Worcester,	May 28,	Henry Chapin.
Morse, Augustus, (13) } Morse, Augustus, (18) } Morse, Augustus, (19) }	Leominster,	" 17,	"
Morse Comb Company,	Leominster,	" 17,	"
Morse, Gardner, (19)	Leominster,	" 17,	"
Mudge, Charles F. (20)	Malden,	" 25,	George F. Choate.
Murphy, James,	Boston,	" 26,	Isaac Ames.
Newell, George H. (5)	Brighton,	" 21,	"
Park, William, (21)	Boston,	" 31,	"
Park, William, Jr. (21)	Boston,	" 31,	"
Payson, Rodney F.	Boston,	" 29,	"
Pease, Gilbert H.	Lenox,	April 29,	James T. Robinson.
Peckham, Asa A. (6)	Charlestown,	May 31,	Isaac Ames.
Percival, James W.	Orleans,	April 3,	Joseph M. Day.
Perry, George A.	Millbury,	May 22,	Henry Chapin.
Pratt, Daniel,	Somerville,	" 8,	Wm. A. Richardson.
Putnam, Joel,	Danvers,	" 7,	George F. Choate.
Reed, William D.	Lawrence,	" 28,	"
Rice, Azro A.	Boston,	" 22,	Isaac Ames.
Rice, David H. (22)	Chelsea,	" 7,	"
Rice, Samuel C.	Somerville,	" 27,	Wm. A. Richardson.
Rice, William A. (22)	Chelsea,	" 7,	Isaac Ames.
Roberts, David S.	Andover,	" 6,	George F. Choate.
Rowe, Allen, (23) } Rowe, Allen, (23) }	Stoneham,	" 3,	Wm. A. Richardson.
Samson, Ichabod,	Boston,	" 4,	Isaac Ames.
Small, John, Jr.	Provincetown,	April 8,	Joseph M. Day.
Smith, Thomas,	Dartmouth,	May 3,	Edmund H. Bennett.
Sparkawk, Samuel, 2d,	Marblehead,	" 17,	George F. Choate.
Stafford, Darius,	Boston,	" 14,	Isaac Ames.
Stewart, Peter,	Rockport,	" 9,	George F. Choate.
Stone, David,	Melrose,	" 24,	Isaac Ames.
Stuart, Eben R. (18)	Leominster,	" 17,	Henry Chapin.
Swan, Timothy, Jr.	Boston,	" 17,	Isaac Ames.
Sweetser, Leonard,	Stoneham,	" 11,	Wm. A. Richardson.
Swift, Charles, (11)	Gloucester,	" 22,	"
Tamplin, James B.	Cambridge,	" 10,	"
Tuttle, Alvin, (20)	Lynn,	" 24,	George F. Choate.
Waldron, Joseph B.	Fall River,	March 19,	Edmund H. Bennett.
Waldron, Levi D.	Saugus,	May 24,	George F. Choate.
Warner, Roswell H.	Dalton,	" 1,	James T. Robinson.
Warren, Ralph,	Melrose,	" 4,	Wm. A. Richardson.
Watkins, George E.	Groveland,	" 30,	George F. Choate.
Weeks, Allen S.	Boston,	" 2,	Isaac Ames.
Wetherell, Abiathar E.	Boston,	" 22,	"
White, William L.	Lee,	" 8,	James T. Robinson.
Wilcox, David B. (12)	New Bedford,	March 28,	Edmund H. Bennett.
Wilmarth, John O.	Attleboro,	May 22,	"
Wood, Mason B.	Cheshire,	" 24,	James T. Robinson.
Wrightington, James H.	New Bedford,	April 18,	Edmund H. Bennett.
Yale, John,	Pittsfield,	June 4,	James T. Robinson.
Zeigler, George,	Roxbury,	May 25,	George White.

PARTNERSHIPS, &c.

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